Nos. 18-36030, 18-36038, 18-36042, 18-36050,
18-36077, 18-36078, 18-36079, and 18-36080

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CROW INDIAN TRIBE, et al., Plaintiffs-Appellees,
v.
UNITED STATES OF AMERICA, et al., Defendants-Appellants,
and
STATE OF WYOMING, et al., Intervenor-Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

SECOND BRIEF ON CROSS-APPEAL (ANSWERING BRIEF) FOR APPELLEES ALLIANCE FOR THE WILD ROCKIES, WESTERN WATERSHEDS PROJECT, & NATIVE ECOSYSTEMS COUNCIL

REBECCA K. SMITH
Public Interest Defense Center
PO Box 7584
Missoula, MT 59807
(406) 531-8133
publicdefense@gmail.com

TIMOTHY M. BECHTOLD
Bechtold Law Firm
P.O. Box 7051
Missoula, MT 59807
(406) 721-1435
tim@bechtoldlaw.net

Attorneys for Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellees Alliance for the Wild Rockies, Western Watersheds Project, and Native Ecosystems Council hereby state, by and through their attorneys, that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Dated this 5th Day of August, 2019.

/s/ Rebecca K. Smith
REBECCA K. SMITH
Public Interest Defense Center
PO Box 7584
Missoula, MT 59807
(406) 531-8133
publicdefense@gmail.com

TIMOTHY M. BECHTOLD
Bechtold Law Firm
P.O. Box 7051
Missoula, MT 59807
(406) 721-1435
tim@bechtoldlaw.net

Attorneys for Appellees

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I. JURISDICTIONAL STATEMENT

Due to the consolidated nature of this appeal, the Plaintiffs-Appellees (collectively "Tribes and Conservation Groups") are filing five separate briefs with a joint Supplemental Excerpts of Record, and each brief will address substantially different issues before this Court. In this brief, Appellees Alliance for the Wild Rockies, Western Watersheds Project, and Native Ecosystems Council (collectively "Alliance") direct the Court's attention to the unique jurisdictional issues presented by this appeal. As set forth at length below, this Court does not have jurisdiction over this appeal.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Alliance incorporates by reference the Statement of Issues in the Answering Briefs/Second Briefs on Cross-Appeal filed by the Tribes and other Conservation Groups.

This brief focuses on whether this Court has jurisdiction to hear this case in light of the U.S. Fish & Wildlife Service's failure to appeal two of the independent grounds for the entry of judgment in the Tribes' and Conservation Groups' favor, and failure to appeal the remand and vacatur ordered by the district court.

III. STATEMENT REGARDING THE ADDENDUM

An addendum is not filed with this brief because this brief addresses jurisdictional issues that do not require review of constitutional provisions, treaties,

statutes, ordinances, regulations, or rules. *See* Ninth Circuit Rule 28-2.7.

IV. STATEMENT OF THE CASE

Alliance incorporates by reference the Statement of the Case in the Answering Briefs/Second Briefs on Cross-Appeal filed by the Tribes and other Conservation Groups. Due to the fact that this brief is focused on jurisdictional issues, the statement of the case below is limited to facts relevant to those jurisdictional issues.

The U.S. Fish & Wildlife Service (hereinafter "Service") removed the Yellowstone grizzly bear from the list of species protected under the Endangered Species Act (ESA) in a Final Rule published June 30, 2017. ER83. A diverse coalition of Native American Tribes, Tribal Members, and Conservation Groups – Crow Indian Tribe, Crow Creek Sioux Tribe, Standing Rock Sioux Tribe, Piikani Nation, The Crazy Dog Society, Hopi Nation Bear Clan, Northern Arapaho Elders Society, David Bearshield, Kenny Bowekaty, Llevando Fisher, Elise Ground, Arvol Looking Horse, Travis Plaited Hair, Jimmy St. Goddard, Pete Standing Alone, Nolan Yellow Kidney, Northern Cheyenne Tribe, Sierra Club, Center for Biological Diversity, National Parks Conservation Association, Wildearth Guardians, The Humane Society of the United States, The Fund for Animals, Alliance for the Wild Rockies, Western Watersheds Project, and Native Ecosystems Council – challenged the Final Rule in the District of Montana in five separate lawsuits, and the cases

were consolidated. *See* ER465. The States of Montana, Idaho, and Wyoming (collectively "States") intervened on behalf of the Service, as did several special interest groups with interests in ranching and trophy hunting (hereinafter "Ranchers and Trophy Hunters"). ER464-466, 475, 478.

The district court entered judgment in favor of the Tribes and Conservation Groups and vacated the Final Rule, in effect restoring the protections of the ESA to Yellowstone grizzly bears. ER496, 494. The Service, States, Ranchers, and Trophy Hunters filed appeals to this Court, which were consolidated. ER497-499.

Although the Service filed an appeal, its Opening Brief clarifies that it does not challenge two of the independent grounds for the district court's entry of judgment, and therefore it does not challenge the entry of judgment in the Tribes' and Conservation Groups' favor. Dkt Entry 45 at 13-15. Moreover, the Service does not appeal the vacatur of the Final Rule. Dkt Entry 45 at 13-15.

Collectively, the intervenors – the States, Ranchers, and Trophy Hunters – do challenge all grounds for the district court's entry of judgment in the Tribes' and Conservation Groups' favor, and they do challenge the vacatur of the Final Rule. *See e.g.* Dkt Entry 59 at 45-52; Dkt Entry 63 at 10-11. However, only two of the six Opening Briefs filed by the intervenors address the threshold issue of whether the intervenors have Article III standing. Dkt Entry 56 at 1; Dkt Entry 59 at 3; Dkt Entry 63 at 8-9; Dkt Entry 77 at 5; Dkt Entry 74 at 1; Dkt Entry 78 at 3-5. The

State of Idaho provides two conclusory paragraphs with generalized grievances, hypothetical injuries, and no citations to supporting sworn affidavits. Dkt Entry 63 at 8-9. Two of the Trophy Hunters – Sportsmen's Alliance and Rocky Mountain Elk Foundation – assert attenuated, speculative injuries that are neither caused by the district court order nor redressable by a favorable order from this Court. Dkt Entry at 78 at 4-5.

V. SUMMARY OF ARGUMENT

This brief focuses on whether this Court has jurisdiction to hear this case in light of the Service's failure to appeal two of the independent grounds for the district court's entry of judgment, and failure to appeal the remedy – remand and vacatur – ordered by the district court. Instead of appealing the judgment and remedy ordered by the district court, the Service requests that this Court line edit the district court's reasoning. The Service's failure to appeal the judgment and remedy issued by the district court means that the Service lacks standing on appeal because even if this Court agreed with the Service, the result would not change.

Moreover, a number of Defendant-Intervenors have also appealed: the States of Montana, Idaho, and Wyoming, as well as a number of organizations dedicated to ranching interests and trophy hunting interests. However, in order for an intervenor to carry an appeal when the primary party either does not appeal or seeks different relief than the intervenor seeks, the intervenor must establish Article III standing.

In this case, the intervenors have failed to meet this requirement. All three States – Montana, Idaho, and Wyoming – fail to establish Article III standing. Montana and Wyoming do not even address standing in their briefs, and Idaho provides only two conclusory paragraphs devoid of evidence of any concrete, redressable injury in fact. While the States may have an interest in state management of grizzly bears, a mere interest, disagreement, or grievance does not confer standing. Instead, the States must demonstrate that the district court's decision will cause a concrete, direct, non-speculative injury to the States. The States have failed to make this requisite showing.

Like Montana and Wyoming, Ranchers fail to address standing in their brief, thus also fail to establish Article III standing. Although one of Trophy Hunters' briefs does address standing, it does not establish that Trophy Hunters have a concrete injury in fact that is caused by the district court's decision and would be redressable by this Court. Instead, Trophy Hunters' interests are speculative and hypothetical, as well as dependent on future State policy determinations that may or may not be made; thus Trophy Hunters have failed to establish injury in fact that is concrete, imminent, and redressable by this Court.

For all of these reasons, Appellants have all failed to establish standing, and this Court should therefore dismiss this appeal for lack of jurisdiction.

VI. STANDARDS OF REVIEW

This Court reviews "the existence of subject matter jurisdiction de novo." *Shell Gulf of Mexico Inc. v. Ctr. for Biological Diversity, Inc.*, 771 F.3d 632, 635 (9th Cir. 2014).

Alliance incorporates by reference the Standard of Review in the Answering Briefs/Second Briefs on Cross-Appeal filed by the Tribes and other Conservation Groups.

VII. ARGUMENT

In order to conserve the resources of this Court and prevent unnecessary redundancy in briefing, Alliance limits this brief to the unique jurisdictional issues presented in this appeal. Regarding all other arguments on the merits, Alliance incorporates the arguments presented in the Answering Briefs/Second Briefs on Cross-appeal filed by the Tribes and other Conservation Groups in these consolidated cases.

As set forth below, this Court lacks jurisdiction to hear this appeal because the Service, States, Ranchers, and Trophy Hunters have all failed to establish standing. Therefore, this appeal should be dismissed.

A. The Service does not dispute that the delisting rule was properly vacated and remanded on at least some grounds.

The district court found that the Service's delisting rule was unlawful for two primary reasons: "(1) the Service erred in delisting the Greater Yellowstone

Ecosystem grizzly bear without further consideration of the impact on other members of the lower-48 grizzly designation; and (2) the Service acted arbitrarily and capriciously in its application of the five-factor threats analysis demanded by the ESA." ER3-4.

Regarding the first ground: "By delisting the Greater Yellowstone grizzly without analyzing how delisting would affect the remaining members of the lower-48 grizzly designation, the Service failed to consider how reduced protections in the Greater Yellowstone Ecosystem would impact the other grizzly populations." ER4.

Regarding the second ground:

> the Service's application of the ESA threats analysis is arbitrary and capricious for at least two reasons. First, by dropping a key commitment - the commitment to ensure that any population estimator adopted in the future is calibrated to the estimator used to justify delisting - the Service illegally negotiated away its obligation to apply the best available science in order to reach an accommodation with the states of Wyoming, Idaho, and Montana. Second, the Service relied on two studies to support its determination that the Greater Yellowstone grizzly can remain independent and genetically self-sufficient. However, the Service's reliance is illogical, as both studies conclude that the long-term health of the Greater Yellowstone grizzly depends on the introduction of new genetic material.

ER4. On these grounds, the district court held: "the Final Rule delisting the Greater Yellowstone Ecosystem grizzly bear is VACATED and REMANDED [.]" ER49.

The Service filed an appeal. ER58-61. However, in its Opening Brief, the

Service clarifies that it does not appeal several aspects of the district court's order.

1. The Service does not appeal the remedy ordered by the district court – vacatur of the delisting rule and remand to the agency.

Regarding remedy, the Service clarifies that it does not appeal the remedy ordered by the district court – vacatur and remand of the delisting rule. *See* ER49. The Service states: "*FWS has accepted a remand in this case* and is already working on some of the issues identified by the district court." Dkt Entry 45 at 13 (emphasis added); *see also* Dkt Entry 45 at 15 ("FWS is already working on the issues remanded in this case"). By stating that it has "accepted a remand in this case," the Service clarifies that it does not appeal the remedy ordered by the district court – remand with vacatur.

2. The Service does not appeal the district court's holding that the delisting rule must analyze how delisting Yellowstone grizzly bears would affect the remaining members of the lower-48 grizzly designation.

Regarding the district court's first stated ground for judgment, the Service clarifies that it does not appeal the district court's holding that the Service must consider the effect of the Yellowstone grizzly delisting rule on other grizzly bears: "FWS therefore does not appeal from the district court's order to the extent that it requires FWS to 'consider the legal and functional effect of delisting a newly designated population segment on the remaining members of a listed entity.' [] That consideration is underway." Dkt Entry 45 at 15. "[I]f on remand FWS again

decides to delist the GYE grizzly bears while leaving grizzly bears listed in the rest of the lower 48 states, then it will explain the impact (if any) of that delisting on the rest of the listed species." Dkt Entry 45 at 23.

Furthermore, the Service concedes that its post-decision "regulatory review" on this issue was legally insufficient: "the regulatory review does not resolve the legal question of whether, when a DPS of a listed species is delisted, the rest of the species continues to qualify as a 'species' within the meaning of the Act. That question will be addressed by FWS on remand if it again designates and delists a GYE grizzly bear DPS while leaving intact the rest of the lower-48 grizzly listing." Dkt Entry 45 at 22-23.

Instead of appealing this ground for judgment, the Service simply objects to one particular phrase in the relevant portion of the district court's reasoning – the phrase "comprehensive review." Dkt Entry 45 at 13, 16. On appeal, the Service asks this Court to strike that particular phrase from the district court's reasoning. *Id.* at 16, 23-28 ("to the extent that the district court directed FWS to conduct a 'comprehensive analysis' of the rest of the species, that portion of its decision should be vacated.")

3. The Service does not appeal the district court's holding that the delisting rule must include a commitment to recalibrate the population estimator.

Regarding the district court's second stated ground for judgment, the Service

acknowledges that the district court held that "FWS did not ensure that mortality limits and other regulatory mechanisms that vary with estimated population would be recalibrated if a new method of estimating population were to be adopted." Dkt Entry 45 at 13. However, other than this acknowledgment, the Service does not address this issue in any of its arguments; thus, it has not appealed this issue. Instead, the Service appeals the portion of the district court's order regarding the issue of genetic self-sufficiency. Dkt Entry 45 at 13-14, 28-37.

B. In light of the fact that the Service does not appeal the judgment or vacatur issued in the Tribes' and Conservation Groups' favor, this Court lacks jurisdiction over the Service's appeal.

The Service states that it "has accepted a remand in this case and is already working on some of the issues identified by the district court." Dkt Entry 45 at 13. The Service further states: "FWS therefore does not appeal from the district court's order to the extent that it requires FWS to 'consider the legal and functional effect of delisting a newly designated population segment on the remaining members of a listed entity.' [] That consideration is underway." Dkt Entry 45 at 15. Nonetheless, the Service argues:

> But the district court's remand order improperly imposes procedures not required by the Act; without this Court's *correction*, that order will hinder the ability of the agency to do its job on remand. The court stated that FWS must conduct a "comprehensive review of the entire listed species" on remand . . . .

Dkt Entry 45 at 13 (emphasis added). Thus, although the Service does not appeal

the district court's ultimate entry of judgment in the Tribes' and Conservation Group's favor, the Service takes issue with one particular phrase in the district's court's explanation, and asks this Court to excise that one phrase: "comprehensive review of the entire listed species." Dkt Entry 45 at 13, 28 ("to the extent that the district court directed FWS to conduct a 'comprehensive analysis' of the rest of the species, that portion of its decision should be vacated.") As discussed above, the Service also does not appeal the recalibration holding, but it does request that this Court excise the portion of the district court's order that addresses the issue of genetic self-sufficiency. Dkt Entry 45 at 13-14, 28-37.

In sum, as the federal government has done in the past, here again it is asking this Court to "line-edit the district court's ruling" without requesting that this Court issue a judgment or remedy that is different than the judgment or remedy already issued by the district court. *See Nat. Res. Def. Council v. Gutierrez*, 457 F.3d 904, 905-06 (9th Cir. 2006). However, as the Supreme Court held over half a century ago, appellate courts "review[] judgments, not statements in opinions. []. At times, the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are made. In such a case, it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests." *Black v. Cutter Labs.*, 351 U.S. 292, 297-98 (1956); *see also In re Williams*, 156 F.3d 86, 90 (1st Cir. 1998) ("it is an

abecedarian rule that federal appellate courts review decisions, judgments, orders, and decrees—not opinions, factual findings, reasoning, or explanations.")

In this case, the Service does not appeal two of the grounds "on which the judgment rests," *see Black*, 351 U.S. at 297-98, nor does the Service appeal the vacatur remedy issued by the district court. This Court holds that under such circumstances, a federal agency has no standing to appeal:

> Defendants conceded in their opening brief, at oral argument and in their supplemental brief that they do not challenge the only form of relief the district court granted—the permanent injunction. Rather, they seek appellate excision of the district court's ruling . . . . Essentially they want us to line-edit the district court's ruling. But they have no standing to challenge the district court's legal rulings in the abstract; they must seek a reversal or a modification of the relief granted by the district court.
> . . .
> To have standing on appeal, defendants must establish that "it is likely, as opposed to merely speculative, that [their] injury will be redressed by a favorable decision." []. This they cannot do. Even if we agreed with defendants that the BiOp complied with the ESA, the permanent injunction would remain in place.

Nat. Res. Def. Council, 457 F.3d at 905-06 (citations omitted).

In this case, the district court entered judgment in favor of the Tribes and Conservation Groups, ER1, and vacated the challenged rule, ER49; the Service does not challenge that judgment or remedy on appeal. While the Service purports to appeal one of the underlying grounds for judgment (genetic self-sufficiency) and the use of one specific phrase ("comprehensive review"), it does not appeal two of

the other underlying grounds for judgment (effect on other grizzlies in the lower-48 designation and recalibration). Summary judgment on one claim alone is sufficient to enter judgment in the Tribes' and Conservation Groups' favor and vacate the delisting rule. *See Greater Yellowstone Coal. v. Servheen*, 665 F.3d 1015, 1032 (9th Cir. 2011) ("We affirm the district court's grant of summary judgment [on one claim]. This is sufficient to affirm the district court's judgment vacating the Rule.")

Therefore, here, as in *Nat. Res. Def. Council*, the Service's injury is not redressable. 457 F.3d at 905-06. Even if the Court agreed with the Service on the genetic self-sufficiency issue or the use of the phrase "comprehensive review," the delisting rule would still remain vacated and judgment would still remain entered in the Tribes' and Conservation Groups' favor. The Service has "no standing to challenge the district court's legal rulings in the abstract . . . ." *Nat. Res. Def. Council*, 457 F.3d at 905-06. The Service's failure to meet the redressability requirement means that this Court lacks jurisdiction over the Service's appeal. *See id.*

C. Intervenors have failed to establish Article III standing; therefore they cannot carry the appeal for the Service.

Although this Court does not have jurisdiction over the Service's appeal, there remains a question whether the Court nonetheless has jurisdiction over the appeals filed by the various intervenors in this case. Under these circumstances,

the Supreme Court requires that an intervenor must establish Article III standing in order to carry the appeal. As set forth in more detail below, the intervenors in this case fail to satisfy this requirement.

1. An intervenor must establish Article III standing in order to carry an appeal.

The Supreme Court holds:

> status as an intervenor below, whether permissive or as of right, does not confer standing sufficient to keep the case alive in the absence of the State [defendant] on this appeal. Although intervenors are considered parties entitled, among other things, to seek review by this Court, [], an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted *is contingent upon a showing by the intervenor that [it] fulfills the requirements of Art. III*.

Diamond v. Charles, 476 U.S. 54, 68-69 (1986)(emphasis added); *see also Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019)("to appeal a decision that the primary party does not challenge, an intervenor must independently demonstrate standing.") An intervenor must demonstrate Article III standing regardless of whether it is an intervenor of right or a permissive intervenor. *In re Molasky*, 843 F.3d 1179, 1185 n.6 (9th Cir. 2016).

Even if the primary party does appeal, an intervenor must still establish Article III standing if the intervenor seeks different relief on appeal than the primary party:

> The threshold issue in this appeal is whether Intervenors must establish independent standing in order to pursue different relief from that sought

> by Oregon, the plaintiff. The answer is yes because the relief sought by Oregon is distinct from the relief sought by Intervenors.
> . . .
>
> The Supreme Court's decision lays to rest Intervenors' argument that they do not need to establish independent Article III standing to bring their Fourth Amendment claim. In accord with *Town of Chester*, we hold that where, as here, the Intervenors seek to obtain different relief than the original plaintiff, the Intervenors must establish independent Article III standing. The Intervenors have not done so.

Oregon Prescription Drug Monitoring Program v. U.S. Drug Enf't Admin., 860 F.3d 1228, 1233-34 (9th Cir. 2017) (citing *Town of Chester, N.Y. v. Laroe Estates*, Inc., 137 S. Ct. 1645, 1651 (2017)).

To establish Article III standing, a party must demonstrate: (1) an injury in fact, (2) a causal connection between the injury and challenged conduct, and (3) that the injury will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Supreme Court holds that Article III standing must be established before a court may address the merits of a case:

> [t]he doctrine of standing . . . serves to prevent the judicial process from being used to usurp the powers of the political branches. []. In light of this overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of an important dispute and to settle it for the sake of convenience and efficiency.

Hollingsworth v. Perry, 570 U.S. 693, 704-05 (2013) (internal citations and punctuation omitted).

Moreover, the Supreme Court holds that standing affidavits cannot be filed

after judgment has been entered and an appeal has been filed. *Summers v. Earth Island Inst.*, 555 U.S. 488, 500 n* (2009)("After the District Court had entered judgment, and after the Government had filed its notice of appeal, respondents submitted additional affidavits to the District Court. We do not consider these. If respondents had not met the challenge to their standing at the time of judgment, they could not remedy the defect retroactively"); *see also Summers*, 555 U.S. at 508 (Breyer, J., dissenting)(noting that additional affidavits were filed after entry of judgment in that case because "the Government did not challenge standing until that point").

In *Organized Village of Kake v. USDA*, this Court addressed the Article III requirement for injury in fact as applied to a state, and found injury in fact satisfied because the State of Alaska demonstrated that the challenged rule directly affected receipts from logging proceeds to which Alaska was entitled under federal law. 795 F.3d 956, 966 (9th Cir. 2015). In contrast, this Court found that the State of Nevada had not established injury in fact in *State of Nevada v. Burford*. This Court held:

> [A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court. [] . . . Even assuming that the right-of-way grant violates the Land Act, the Environmental Act, and the Constitution, Nevada fails to show how those violations result in injury to Nevada. We agree with the district court that Nevada's claims merely "constitute a generalized grievance that the [Bureau] is not acting in a way in which [Nevada] maintains is in accordance" with federal laws. []. This is insufficient to demonstrate standing.

State of Nev. v. Burford, 918 F.2d 854, 856-57 (9th Cir. 1990).

This Court has also addressed injury in fact as applied to special interest groups such as ranching groups and sport-hunting groups. For example, in *Western Watersheds Project v. Kraayenbrink*, this Court found that a ranching interest group's members, one of whom would be denied a title to property, and one of whom would have his ranching permit reduced by 30%, demonstrated sufficiently concrete injury for the association to establish injury in fact. 632 F.3d 472, 482-484 (9th Cir. 2011).

In contrast, this Court has found that sport-hunting groups do not have standing to appeal in the absence of the government defendant if they cannot establish a concrete, particularized injury in fact, causation, and redressability. *See, e.g., Palila v. Hawaii Dep't of Land & Nat. Res*., 246 F.3d 675 (9th Cir. 2000)("Because nothing in the record indicates that [Sportsmen of Hawaii] or its members will suffer a concrete, particularized injury if the Palila becomes extinct, [Sportsmen of Hawaii] has not established the constitutional requirements of standing"); *see also Friends of Wild Swan v. Vermillion*, 694 F.Appx 475, 477 (9th Cir. 2017)(wildlife trapping association could not establish injury in fact with regard to agreement between conservationists and state wildlife agency to propose certain management changes that would affect the trapping of lynx, a species listed under

the ESA).

Addressing injury in fact in *Diamond*, the Supreme Court found that a doctor did not have injury in fact to defend an anti-abortion law because it was speculative whether fewer abortions would result in more paying clients for that particular doctor. 476 U.S. at 66. The doctor's mere desire to "vindicate value interests" was not sufficient to establish "injury in fact." *Id.* Thus, "[t]he presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." *Id.*

This Court addressed the redressability requirement in *Sierra Club v. Dombeck*. In that case, the district court ruled in favor of an environmental plaintiff, and the federal agency did not appeal but instead decided to perform the environmental analysis ordered by the district court. This Court held: "the Forest Service has effectively acquiesced in the district court's determination that other work must also be done before a new ROD is issued. [Intervenor] cannot compel it to do otherwise. In these circumstances, we conclude that [Intervenor] lacks standing to pursue this appeal." *Sierra Club v. Dombeck*, 55 F. Appx 411, 412 (9th Cir. 2002). In a similar case, this Court held: "a favorable decision would not redress the appellants' alleged injury. A party has no redressability where 'any prospective benefits depend on an independent actor who retains 'broad and legitimate discretion the courts cannot presume either to control or predict.' "

Friends of Wild Swan, 694 F. Appx 475, 477 (citation omitted).

2. Montana does not seek reversal regarding the judgment or remedy issued by the district court, and does not establish Article III standing.

As discussed above, the Service in part (1) does not appeal the district court's ruling that the Service must address the impact of delisting on other grizzly bears in the lower-48 grizzly designation, and (2) does not dispute that remand with vacatur is appropriate in this case. Instead of stepping in to fill this void, Montana states: "Montana adopts Federal Appellants' arguments in its Opening Brief (Doc. 45) with respect to the impact of delisting the Yellowstone DPS on other grizzly bear populations." Dkt Entry 56 at 15. Thus, Montana's appeal concedes that the district court's entry of judgment in the Tribes' and Conservation Groups' favor was correct. *See Greater Yellowstone Coal*, 665 F.3d at 1032 (summary judgment on one ground "is sufficient to affirm the district court's judgment vacating the Rule"). Furthermore, Montana does not challenge the remedy – vacatur and remand – ordered by the district court.

Finally, Montana does not address Article III standing anywhere in its brief, as required for an intervenor in these circumstances. *Diamond*, 476 U.S. at 68-69; *Oregon Prescription Drug Monitoring Program*, 860 F.3d at 1233-34. Montana's jurisdictional statement is silent on this issue. Dkt Entry 56 at 1. Accordingly, for all of these reasons, Montana fails to provide this Court with jurisdiction to hear this

appeal. *Diamond*, 476 U.S. at 68-69; *Oregon Prescription Drug Monitoring Program*, 860 F.3d at 1233-34.

3. Wyoming does not establish Article III standing.

Unlike the Service and Montana, Wyoming does challenge the district court's holding that the Service must analyze the effect of delisting on other grizzly bears in the lower-48 designation. Dkt Entry 59 at 45-52. Wyoming also challenges the district court's decision to vacate the delisting rule. *Id*. However, Wyoming fails to meet the requirement that an intervenor must establish Article III standing on appeal in order to carry the appeal in place of the Service. *See Diamond*, 476 U.S. at 68-69; *Oregon Prescription Drug Monitoring Program*, 860 F.3d at 1233-34. Wyoming does not mention standing anywhere in its brief, and its jurisdictional statement is silent on this issue. Dkt Entry 59 at 3. Accordingly, Wyoming cannot carry this appeal in place of the Service. *Diamond*, 476 U.S. at 68-69; *Oregon Prescription Drug Monitoring Program*, 860 F.3d at 1233-34.

4. Idaho does not establish Article III standing.

Idaho appeals all underlying grounds for judgment in the district court order. Dkt Entry 63 at 10-11. Idaho also recognizes in its jurisdictional statement that it must establish Article III standing because the Service did not appeal all issues and did not appeal the vacatur of the delisting rule. *Id.* at 8-9. Nonetheless, Idaho has failed to establish Article III standing: it provides two conclusory paragraphs devoid

of details, and fails to provide any citation to any supporting affidavits or other documentation in support of its arguments. *Id.* at 9. Idaho's entire standing argument states:

> Idaho has demonstrated "injury in fact," causation, and redressability. The district court judgment directly and adversely affects Idaho's ability to manage the recovered grizzly bear population within the GYE in Idaho. Idaho has invested considerable state resources for decades to achieve GYE grizzly bear population recovery. Idaho also invested litigation resources to obtain recognition from this Court as to the adequacy of regulatory mechanisms under the prior 2007 delisting rule, and Idaho has continued to strengthen state regulatory mechanisms and other conservation measures since then.
>
> By returning heightened ESA protections to a recovered population, the district court judgment adversely affects Idaho's ability to manage the GYE grizzly bear DPS in general and to address public safety conflicts and property loss involving bears. See 50 C.F.R. 17.40(b). This injury is redressable through reversal of the district court's judgment and reinstatement of the delisting rule.

Id. at 9.

Such a "generalized grievance" by a state is "insufficient to demonstrate standing." *See State of Nev.*, 918 F.2d at 856-57. First, Idaho does not explain why its *past* expenditures on grizzly bear management and litigation would meet the requirement to show that upholding the district court's decision would cause a *future* concrete and imminent injury, or *ongoing* injury, as required. As the Supreme Court held in *Lujan*:

> [The affidavits] plainly contain no facts, however, showing how damage to the species will produce "imminent" injury to [the affiants].

> That the women "had visited" the areas of the projects before the projects commenced proves nothing. As we have said in a related context, " 'Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects.

Lujan, 504 U.S. at 564 (citation omitted).

Thus, even if it was reasonable for Idaho to categorize legally-required and/or voluntary past expenditures as an "injury," the past expenditures would only constitute a past injury, not an imminent or ongoing injury. This presents a fatal causation problem because there is no way that expenditures that occurred *prior* to the challenged district court decision could be said to have been *caused by* the challenged district court decision. Yet that is what Article III standing requires – an injury in fact that is caused by the challenged conduct. *See Lujan*, 504 U.S. at 560-61.

Second, Idaho argues that it is concerned about "public safety conflicts and property loss" but it provides no explanation of the details of this concern, nor any evidence that the challenged district court decision is causing public safety conflicts and property loss. To be clear, even with federal protection as a listed species under the ESA, grizzly bears may still be "taken" for public safety and property loss reasons. For example, "[g]rizzly bears may be taken in self-defense or in defense of others . . . ." 50 C.F.R. §17.40(b)(1)(i)(A). Additionally, "[a] grizzly bear constituting a demonstrable but non immediate threat to human safety or committing

significant depredations to lawfully present livestock, crops, or beehives may be taken . . . ." 50 C.F.R. §17.40(b)(1)(i)(B). Idaho has made no showing that these existing allowances for grizzly bear "take" in cases of self-defense, defense of others, or depredations to livestock, crops, or beehives are insufficient; therefore Idaho fails to show that its generalized grievances present a non-speculative, concrete, imminent injury in fact that has been caused by the district court's decision.

In summary, the mere fact that Idaho objects to federal management of grizzly bears does not establish injury in fact: "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." *Diamond*, 476 U.S. at 66. The "generalized grievances" Idaho presents are "insufficient to demonstrate standing." *State of Nev*, 918 F.2d at 856-57.

Finally, Idaho does not address the redressability problem presented in this case – the fact that the Service "has accepted a remand in this case and is already working on some of the issues identified by the district court." Dkt Entry 45 at 13. As this Court held under similar circumstances: "the [Service] has effectively acquiesced in the district court's determination that other work must also be done before a new [rule] is issued. [Intervenor] cannot compel it to do otherwise. In these circumstances, we conclude that [Intervenor] lacks standing to pursue this

appeal." *Sierra Club*, 55 F. Appx at 412.

5. The Ranchers and Trophy Hunters fail to establish Article III standing.

In addition to the three States, several ranching and/or trophy hunting groups have also intervened and filed three additional Opening Briefs in this appeal. Dkt Entries 77, 78, 74. The Ranchers fail to address Article III standing anywhere in their brief, and their jurisdictional statement is silent on the issue. Dkt Entry 77 at 5. The Opening Brief of Trophy Hunters National Rifle Association and Safari Club International also fails to address Article III standing anywhere in the brief, and the jurisdictional statement is silent on the issue. Dkt Entry 74 at 1.

Only the Opening Brief of Trophy Hunters Sportsmen's Alliance Foundation and Rocky Mountain Elk Foundation (collectively "Sportsmen") addresses Article III standing. Dkt Entry 78 at 3-5. Sportsmen allege three injuries from the district court's decision:

1. A purported inability to hunt grizzly bears, Dkt Entry 78 at 4 (citing SAF/RMEF ER6, 12, 14);
2. A purported inability to prevent a grizzly bear from attacking a hunting dog, Dkt Entry 78 at 5 (citing SAF/RMEF ER 5, 14, and 50 C.F.R. §§17.21(c)(2) and 17.31(a)); and
3. Purported difficulty in elk hunting if (a) the States do not reduce grizzly

populations, and (b) the failure to reduce the grizzly population then results in higher levels of depredation of elk by grizzly bears, and (3) that higher level of depredation of elk by grizzly bears results in a reduction in the success rates of its elk hunting members, Dkt Entry 78 at 5 (citing SAF/RMEF ER25).

As set forth below, none of these alleged injuries are concrete, imminent, non-speculative, non-hypothetical injuries that constitute an injury in fact that is caused by the challenged district court decision and redressable by a favorable ruling by this Court. Accordingly, Sportsmen fail to establish Article III standing.

a. There is no indication that any of Sportsmen's members possessed a grizzly bear hunting permit for the 2018 hunting season; a mere desire to hunt grizzly bears at some point in the future does not establish standing.

Sportsmen argue that "[t]he District Court's judgment vacating the GYE Final Rule reinstated the ESA prohibition against 'take' of grizzlies, *preventing hunting plans* by SAF and RMEF members." Dkt Entry 78 at 4 (citing SAF/RMEF ER6, 12, 14 (Heusinkveld Decl. ¶8; Denny Decl. ¶¶6, 12))(emphasis added). Contrary to this representation, the cited declarations do not provide any evidence that either of the two declarants, or any other organizational member, actually won a grizzly bear hunting permit for the 2018 hunting season from any of the three States. In fact, both declarations were signed in February 2018, which was five months before

any grizzly bear hunting permits had been awarded to hunters. SAF/RMEF ER9, 16.

Critically, both declarations completely ignore and fail to disclose the legal requirement that a hunter must first win a lottery for a hunting permit before she or he could lawfully hunt delisted Yellowstone grizzly bears in any of the three States. In the period of time between the publication of the final delisting rule and the district court's summary judgment order, the States had the opportunity to prepare for a grizzly bear hunt in the fall of 2018. For the 2018 hunting season, Montana did not issue any grizzly bear hunting permits; Wyoming issued 22 hunting permits (awarded July 26, 2018); and Idaho issued one hunting permit (applications accepted until July 15, 2018). *See* Wyoming Grizzly Hunting Regulations[1]; Idaho Grizzly Hunting Regulations.[2] Sportsmen have failed to establish that the district court's order "prevent[ed] [their] hunting plans" because there is no evidence that any of Sportsmen's members actually won one of the 23 available hunting permits in July of 2018. Without a hunting permit, there could be no concrete hunting plans.

Although the declarants may "welcome the new opportunity to participate in bear hunts in the GYE area," *id.*, the Supreme Court holds that "[s]uch 'some day'

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[1]https://wgfd.wyo.gov/Regulations/Regulation-PDFs/REGULATIONS_CH68.pdf

[2]https://idfg.idaho.gov/sites/default/files/seasons-rules-grizzly-bear-2018.pdf

intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan*, 504 U.S. at 564. As the Supreme Court has held:

> Article III . . . requires an injury in fact that distinguishes a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem. []. Diamond has an interest, but no direct stake, in the abortion process. This abstract concern ... does not substitute for the concrete injury required by Art. III. [].

Diamond, 476 U.S. at 66-67 (internal quotation marks and citations omitted). In this case, Sportsmen have an interest in hunting, but their failure to obtain a hunting permit means they lack the "direct stake" required to establish Article III standing.

Accordingly, this is not a case like *Western Watersheds Project*, in which this Court found that two rancher-intervenors had standing because one rancher would be denied a title to property, and one rancher would have his ranching permit reduced by 30%. 632 F.3d at 482-484. Unlike this case, those harms were non-speculative, non-hypothetical, tangible, concrete injuries to individuals with a direct stake in the outcome.

For a similar reason, there is also no causal connection or redressability here. The district court's decision did not prevent Sportsmen from hunting grizzly bears because Sportsmen did not possess a grizzly bear hunting permit in the first place.

Likewise, a favorable ruling from this Court would not automatically allow Sportsmen to hunt grizzly bears; hunting would still be contingent on winning a lottery and receiving a permit from one of the States, which is an action that this Court cannot compel in this case. The Supreme Court holds: "State policymakers . . . retain broad discretion to make 'policy decisions' . . . . Federal courts may not assume a particular exercise of this state . . . discretion in establishing standing . . . ." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006). Thus, "[a] party has no redressability where 'any prospective benefits depend on an independent actor who retains 'broad and legitimate discretion the courts cannot presume either to control or predict.' " *Friends of Wild Swan*, 694 F. Appx 475, 477 (citation omitted); *see also Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1228 (9th Cir. 2008) ("The court cannot order renegotiation of the Treaty, and discretionary efforts by the agencies are too uncertain to establish redressibility.")

b. Harm to hunting dogs is a completely speculative injury, and it appears to apply only to a different species – wolves.

Sportsmen further argue: "The reinstatement of the 'take' prohibition, will also put members' hunting dogs at risk, because hunters pursuing other species may only neutralize a grizzly bear threat on their dog if the grizzly's attack is directed against the hunter personally, not the dog." Dkt Entry 78 at 4-5 (citing SAF/RMEF ER5, 14 (Heusinkveld Decl. ¶¶ 6, 7; Denny Decl. ¶¶10, 11) and 50 C.F.R.

§§17.21(c)(2), 17.31(a) and representing that " self-defense exception limited to defense of human life").

This representation is problematic on many levels. First, the notion that a grizzly bear may "some day" pose a risk to a hunting dog is completely speculative and/or hypothetical, and therefore does "not support a finding of the 'actual or imminent' injury that our cases require." *Lujan*, 504 U.S. at 564.

Second, although one declarant asserts that it has "members who have suffered grizzly attacks on their hunting dogs," it provides no details to substantiate this claim. SAF/RMEF ER5. This assertion is particularly troubling in light of the fact that this representation was apparently cut-and-pasted from a declaration filed in a different case about an altogether different species – wolves:

Paragraph 8 – Declaration filed in Wolf Delisting Case[3]	Paragraph 7 – Declaration filed in Grizzly Delisting Case
If the wolf DPS is re-listed and members are prevented from defending their animals with the use of force, gray wolves will present a significant threat to USSAF members' dogs. While the wolf was protected under ESA listing, some members' dogs were attacked.	If the GYE DPS of grizzlies is re-listed and members are prevented from defending their animals with the use of force, grizzlies will present a significant threat to SAF members' dogs. [*No such representation in grizzly declaration*]

[3]This document is publicly available at *Humane Society v. Salazar*, CV-13-00186-BAH (D. D.C.), Document 11-4 at pages 1-6, Exhibit N, Declaration of Evan Heusinkveld (dated April 13, 2013 and filed April 23, 2013).

Please see the declaration of Scott Meyer, a member of the WBHA, which in turn is an organizational member of USSAF.	[*No such representation in grizzly declaration*]
Scott and other individual members who have suffered wolf attacks on their hunting dogs have lost both the personal value of their relationship with their dogs and the value of the dogs as personal property.	SAF members who have suffered grizzly attacks on their hunting dogs have lost both the personal value of their relationship with their dogs and the value of the dogs as personal property.
The safety of USSAF members' dogs, and consequently the continued enjoyment of recreational hunting by many of its members, depends upon USSAF members' ability to protect their dogs.	The safety of SAF members' dogs, and consequently the continued enjoyment of recreational hunting by many of its members, depends upon SAF members' ability to protect their dogs.
Watching their dogs be attacked by wolves is an emotionally distressing occurrence for hunters.	Watching their dogs be attacked by bears is an emotionally distressing occurrence for hunters.
When the gray wolf was removed from the endangered species list, the ability of these members to protect their dogs from wolves and consequently their enjoyment of hunting was substantially increased.	When the grizzly was removed from the endangered species list, the ability of these members to protect their dogs from wolves and consequently their enjoyment of hunting was substantially increased.
Returning the gray wolf to the endangered/threatened species lists as advocated by Plaintiffs would likely prevent hunters from using force to protect their dogs from wolves due to the ESA prohibitions against take.	Returning the grizzly to the threatened species list as advocated by Plaintiffs would likely prevent hunters from using force to protect their dogs from grizzlies due to the ESA prohibitions against take.

Notably, Sportsmen forgot to remove one of the references to wolves in their grizzly bear declaration: "When the *grizzly* was removed from the endangered species list, the ability of these members to protect their dogs *from wolves* . . . was substantially decreased." SAF/RMEF ER6 (emphases added). Thus, it is clear that Sportsmen used their wolf declaration as a template and substituted in the word "grizzlies" for "wolves." This is problematic because while Sportsmen referenced evidence of a *wolf* killing a hunting dog, which belonged to a member named Scott Meyer, in their wolf declaration,[4] Sportsmen apparently have no evidence of a *grizzly bear* killing a member's hunting dog, yet they left that representation in the grizzly bear declaration nonetheless: "SAF members who have suffered grizzly attacks on their hunting dogs . . . ." SAF/RMEF ER6.

In light of Sportsmen's removal of the reference to Scott Meyer, and their failure to reference any other member for evidence of a grizzly bear actually killing a member's hunting dog, this representation in the grizzly bear declaration appears to be false and therefore undermines the credibility of Sportsmen's declarants. Certainly, a false representation in a declaration cannot establish injury-in-fact.

Finally, the legal representations made regarding self-defense are misleading

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[4]Meyer's own declaration states: "On December 17, 2001 wolves attacked and killed one of my dogs." This document is publicly available at *Humane Society v. Salazar*, CV-13-00186-BAH (D. D.C.), Document 11-4 at pages 41-44, Exhibit W, Declaration of Scott Meyer (dated April 19, 2013 and filed April 23, 2013).

because Sportsmen cite only the generally applicable self-defense exception in the ESA regulations – 50 C.F.R. §§17.21(c)(2), 17.31(a). Sportsmen fail to disclose or acknowledge the regulation that is specific to grizzly bears, which allows "take" of grizzlies not only in self-defense, but also in defense of others, as well as in defense of livestock, crops, and beehives. 50 C.F.R. §§ 17.40(b)(1)(i)(A),(B).

c. The possibility that the district court's decision will reduce Sportsmen's elk hunting success rate is too speculative to constitute injury in fact and satisfy the redressability requirement.

Finally, Sportsmen argue: "the inability for states to manage grizzly bear populations, including the options of hunting grizzly bears, could reduce the number of other grizzly bear prey species in the region (e.g. elk), injuring hunting, recreational, and other necessary wildlife management activities of SAF and RMEF." Dkt Entry 78 at 5. In other words, Sportsmen argue that if the grizzly was delisted, the States could allow grizzly bear hunting, which in turn might result in fewer grizzly bears on the landscape, which in turn might affect elk population numbers if there were fewer grizzly bears to kill elk, which in turn might increase the likelihood that Sportsmen's members would have success in elk hunting. This chain of hypothetical events is far too speculative to satisfy the stringent requirements of injury in fact.

The Supreme Court rejected a similar argument in *Diamond*.

Diamond, who is a pediatrician, claims that if the Abortion Law were

> enforced, he would gain patients; fewer abortions would be performed and those that would be performed would result in more live births, because the law requires a physician to attempt to preserve the life of the aborted fetus. By implication, therefore, the pool of potential fee-paying patients would be enlarged. *The possibilities* that such fetuses would survive and then find their way as patients to Diamond *are speculative, and "unadorned speculation will not suffice to invoke the federal judicial power."*

476 U.S. at 66 (emphases added). Sportsmen's similarly "unadorned speculation" in this case must also be rejected; Sportsmen fail to establish actual, imminent injury in fact.

For similar reasons, there is also no redressability here. This Court cannot compel the States to manage grizzly bear or elk populations in any particular manner; thus there is no guarantee that a favorable ruling would ultimately result in a reduction of the grizzly bear population that would result in an increase in the elk population that would result in a successful elk hunt for Sportsmen's members. As noted above, "State policymakers . . . retain broad discretion to make 'policy decisions' . . . . Federal courts may not assume a particular exercise of this state . . . discretion in establishing standing . . . ." *DaimlerChrysler Corp.*, 547 U.S. at 346. The States' future decisions on how to manage grizzly and elk populations "may be subject to a number of political and legal factors quite independent from this court's determination . . . . It is therefore simply impossible for the court to predict that such action 'will be made' or is even 'likely' . . . . As such, [the] injuries are not redressable . . . ." *Levine v. Vilsack*, 587 F.3d 986, 995 (9th Cir. 2009).

VIII. CONCLUSION

For the reasons set forth above, this Court lacks jurisdiction over this appeal. The Service does not appeal the entry of judgment in the Tribes' and Conservation Groups' favor, nor does it appeal the district court's vacatur and remand of the challenged rule. This Court reviews judgments, not statements in opinions. The Service lacks standing to challenge district court's legal rulings in the abstract.

Additionally, the States, Ranchers, and Trophy Hunters fail to establish Article III standing. Most of their briefs do not even mention standing, much less establish it. While Idaho does address standing, its two conclusory paragraphs fail to establish injury in fact because they mention only past expenditures and generalized grievances. Additionally, Sportsmen raise only general interests and speculative injuries, all of which are dependent upon third parties that this Court cannot compel. Therefore, Sportsmen do not have redressable injuries in fact.

Accordingly, all Appellants lack standing, and this Court may dismiss this case for lack of jurisdiction.

Respectfully submitted this 5th Day of August, 2019.

/s/ Rebecca K. Smith
REBECCA K. SMITH
Public Interest Defense Center

TIMOTHY M. BECHTOLD
Bechtold Law Firm

Attorneys for Appellees

IX. STATEMENT OF RELATED CASES

The related cases pending before this Court – Nos. 18-36030, 18-36038, 18-36042, 18-36050, 18-36077, 18-36078, 18-36079, and 18-36080 – have been consolidated.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief/second brief on cross-appeal is proportionately spaced, has a typeface of 14 points or more and contains 8,324 words excluding the cover, corporate disclosure statement, table of contents, table of authorities, statement of related cases, certificates of compliance and service, and signature blocks.

/s/ Rebecca K. Smith
REBECCA K. SMITH
Public Interest Defense Center

TIMOTHY M. BECHTOLD
Bechtold Law Firm

Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 5, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Rebecca K. Smith
REBECCA K. SMITH
Public Interest Defense Center

TIMOTHY M. BECHTOLD
Bechtold Law Firm

Attorneys for Appellees