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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CROW INDIAN TRIBE, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, et al.,
Defendant-Appellant,

and

STATE OF WYOMING, et al.,
Intervenor-Defendants-Appellants.

On appeal from the United States District Court for the District of Montana
Case Nos. 17-0089, 17-0117, 17-0118, 17-0119, 17-0123, 18-0016
(Hon. Dana L. Christensen)

ANSWERING BRIEF FOR PLAINTIFF-APPELLEES, CROW INDIAN TRIBE, ET AL.

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CORPORATE DISCLOSURE STATEMENT

No member of the Crow Tribe group is a corporation or other entities for which a corporate disclosure statement is required.

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GLOSSARY

Conservation Groups and Northern Cheyenne Tribe	Plaintiff-Appellees Wild Earth Guardians; Sierra Club, et al; Northern Cheyenne Tribe, Humane Society, et al; and Alliance for the Wild Rockies, et al.
Crow Tribe group	The Crow Indian Tribe, Crow Creek Sioux Tribe, Standing Rock Sioux Tribe, Lower Brule Sioux Tribe, Ponca Tribe of Nebraska, Piikani Nation, 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, and Gary Dorr.
ESA	Endangers Species Act
Sportsmen's Alliance	Sportsmen's Alliance Foundation and Rocky Mountain Elk Foundation

STATEMENT OF JURISDICTION AND STATEMENT OF ISSUES PRESENTED FOR APPEAL

As discussed in section I of this brief, the issue presented for review is whether this Court has jurisdiction. This Court reviews that its own jurisdiction de novo. *E.g., Silver Sage Partners, Ltd. v. City of Desert Hot Springs (In re City of Desert Hot Springs)*, 339 F.3d 782, 787 (9th Cir.2003).

STATEMENT OF THE CASE

The Crow Indian Tribe, Crow Creek Sioux Tribe, Standing Rock Sioux Tribe, Lower Brule Sioux Tribe, Ponca Tribe of Nebraska, Piikani Nation, 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, and Gary Dorr (hereinafter Crow Tribe group) adopts the statement of the case provided in the Answering Brief for Plaintiff-Appellee WildEarth Guardians.

SUMMARY OF THE ARGUMENT

The threshold issue in every case in this Court is whether this Court has jurisdiction. *United States v. Denedo*, 556 U.S. 904 (2009); *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009); *United Investors Life Ins. Co v. Wadell & Reed Inc.*, 360 F.3d 960, 966-67 (9th Cir. 2004). Appellants have the burden to establish this Court's jurisdiction. *Melendres v. Maricopa Cty.*, 815 F.3d 645, 649 (9th Cir. 2016). In most cases in this Court, the basis of this Court's jurisdiction is clear, and an appellant can meet its burden with ease. This is not one of those cases.

This Court is going to have obvious and serious jurisdictional concerns in this case, which it would raise sua sponte even if not raised by a party. *E.g. Organized Village of Kake v. U.S. Dept. of Ag.*, 795 F.3d 956 (2015); *Chugach Alaska. Corp.*

v. Lujan, 915 F.2d 454 (9th Cir. 1990) ("Because the district court remanded to the agency, it is not clear that we have jurisdiction over this appeal.").

This is, therefore, a case where the Appellants needed to brief the threshold jurisdictional issue. No appellant has met that briefing requirement, and no Appellant has met its burden to establish that this Court has jurisdiction over this appeal.

ARGUMENT

In its appeal in this case, the United States concedes that the District Court properly vacated the agency decision and remanded to the agency for further consideration. It is not appealing the order of remand, and it is not seeking reinstatement of its erroneous 2017 delisting decision. In fact it expressly acknowledges that it has "accepted a remand." U.S. Br. at 13. Based upon this concession, the United States has, by rule published in the Federal Register, reinstated the Yellowstone grizzly bears to ESA protection. 84 Fed. Reg. 37144 (published and effective July 31, 2019).

The Crow Tribe group is not sure what the United States is seeking to appeal, let alone any case law which would support this Court exercising jurisdiction over the appeal. The Crow Tribe group has not been able to locate any case where the United States has conceded that its prior administrative decision was properly remanded to the agency, but has filed a notice of appeal. It appears to the Crow

Tribe group that the United States is seeking advisory opinions from this Court on two issues that it briefs. For one of those two issues, the United States has not even preserved the issue for appeal. Cir. R. 28-2.5 (Appellants must state where in the record the issue was raised and ruled upon). It is, at the very least, doubtful that the United States has brought an appeal within this Court's jurisdiction.

Most other Appellants[1] are appealing the order of remand, so they meet the jurisdictional element that the United States failed to meet, but they have other insurmountable jurisdictional problems. Because this Court staggered the Appellants' briefing, the non-federal Appellants knew prior to filing their briefs that the United States had accepted the order on remand, was working on the remanded issues, and was not appealing the order of remand. The non-federal parties' authority to appeal when the United States is not appealing the remand order is, at the very least, doubtful.

This Court therefore should expect that each Appellant would have provided a lengthy discussion of the obvious jurisdictional questions as part of its opening brief. Fed. R. App. Proc. 28(a)(4)(B) (requiring appellants to set for the facts and law which support appellate court jurisdiction); *Thys Co. v. Anglo Cal. Nat. Bank*, 219 F.2d 131, 133 (9th Cir. 1955) ("The purpose of [Federal Rule of Appellate

[1] Like the United States, the State of Montana is not appealing the District Court decision remanding to the agency for further proceedings.

Procedure 28] in respect of briefs is to conserve the time and energy of the court and clearly to advise the opposite party of the points he is obliged to meet."). The Crow Tribe group would then have provided their detailed responsive adversarial briefing, and this Court would have the adversarial briefing which "is crucial to sound judicial decision making. We rely on it to yield insights (or reveal pitfalls) we cannot muster guided only by our own lights." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1232-33 (2018) (Gorsuch, J., concurring) (internal quotation marks omitted), *cited in* U.S. Br. at 32.

Appellants will likely seek, in their reply briefs, to assert various theories for why this Court has jurisdiction. This Court should reject any such arguments. They would come too late. *E.g.*, *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259-60 (9th Cir.1996) (declining to consider arguments raised for the first time in an appellant's reply brief); *see also Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1514 n. 6 (9th Cir.1994) (acknowledging that "serious questions of fairness" arise when a party advances an issue for the first time in his reply).

As Wright and Miller summarize, where, as in this case, jurisdiction is not readily apparent, an appellant needs to provide detailed briefing in order to meet its burden of proof and in order to comply with Rule of Appellate Procedure 28. Wright and Miller also provide ample case citations that an appellant who fails to provide that briefing does so at peril of having its appeal dismissed. 16AA Wright & Miller, Fed. Prac. & Proc. Juris. 3974.1 (4th ed.). Here, even if Appellee had not raised this

issue in its response brief, the Court itself would have raised that issue *sua sponte*, and would have itself noted that Appellants failed to meet their threshold obligation to analyze jurisdiction.

No Appellant has provided the required briefing. Therefore no Appellant has met its burden to establish jurisdiction, and this Court need not, and should not, go on to consider any merits issue because Appellants have not met their burden on the threshold issue.

I. THIS COURT SHOULD DISMISS THE APPEAL BECAUSE NO APPELLANT HAS BRIEFED JURISDICTION OR BECAUSE THIS COURT LACKS JURISDICTION.

A. THE UNITED STATES HAS NOT ESTABLISHED JURISDICTION OVER ITS NON-APPEAL OF THE DISTRICT COURT ORDER OF REMAND.

The United States' discussion of jurisdiction is on page 2 of its opening brief. It is the type of rudimentary statement of jurisdiction that one can make when jurisdiction is obvious.

In Subsection (a) of its short jurisdictional statement, the United States correctly states that the District Court had jurisdiction. Subsection (c) correctly states that the United States filed its notice of appeal within 60 days of the entry of judgment. Subsection (b) contains the only other jurisdictional allegation found anywhere in the United States' 38 page brief. It states, in whole:

> The district court's judgment was final because it granted all plaintiffs' motions for summary judgment and vacated the rule under review. 1 E.R. 1, 48-49. This Court has jurisdiction under 28 U.S.C. § 1291.

Nowhere in its brief does the United States ever discuss why this Court has jurisdiction over the United States' non-appeal of the order of remand. Nowhere does it discuss how this Court can exercise jurisdiction over an appeal by the United State when the appealing administrative agency has itself "accepted a remand," and is activing working on remanded issues. Under these facts, the Crow Tribe group's view is that this Court lacks jurisdiction. *Nat. Res. Defense Council v. Gutierrez*, 457 F.3d 904, 906 (9th Cir. 2006) (Where the appellants "conceded . . . that they do not challenge the only form of relief the District Court granted—the permanent injunction," this Court dismissed the appeal. This Court only needed three paragraphs to explain that result). In the present case, as in *National Resources Defense Council*, Appellant United States has conceded that it is not challenging the only form of relief granted—an order vacating and remanding. It would appear that the United States therefore cannot bring its current appeal, but the threshold issue is even simpler. The United States at least had to provide an argument on jurisdiction, not the minimal boilerplate in which it is merely asserting that it filed a notice of appeal within 60 days of the District Court issuing the order and judgment vacating and remanding.

The United States' failure to brief the obvious jurisdictional question places the Crow Tribe group in an untenable situation. The Crow Tribe group has no Appellant argument to which the Crow Tribe group can respond. This is particularly

problematic as it relates to the federal brief, because the Crow Tribe group cannot even see a good argument that the United States could make. Instead all the Crow Tribe group can see are about a half dozen approximately equally weak arguments on issues of first impression that it could imagine some attorney trying to make in support of jurisdiction over the United States' appeal. In order to even present any of those weak jurisdictional arguments, the United States would have had to make difficult strategy decisions, because it would have had to make one or more large concessions or admissions in order to make a weak jurisdictional argument.[2] It is not the Crow Tribe group's job to make the United States strategy choices for it, or to make the United States arguments for it, and the Crow Tribe group does not have to attempt to guess at what argument an opposing party might make. The Crow Tribe group's response brief is supposed to respond to the arguments the United States did make. The United States did not make an argument on jurisdiction.

[2] For example, the United States asserts this Court should line-edit the District Court decision. It would appear that any weak argument that the United States could have presented that this Court has jurisdiction to do that line-editing would have required the United States to expressly concede that the line it was asking this Court to edit was a specific district court holding and mandate on remand. By not briefing jurisdiction, the United States is evading that concession, and in its merits discussion the United States hedges its appeal, trying to have its cake and eat it too, by claiming that its requests for line-edits could merely be clarifications or edits to what the United States asserts are non-binding dicta in the District Court decision.

B. INTERVENOR-DEFENDANT-APPELLANTS STATE OF IDAHO AND SPORTSMEN'S ALLIANCE HAVE FAILED TO MEET THEIR BURDEN TO ESTABLISH JURISDICTION.

Unlike the United States, the State of Idaho and the Sportsmen's Alliance have provided more than a single boilerplate paragraph discussing jurisdiction. It is not much more than a paragraph, but they have at least provided an outline of why they claim this Court has jurisdiction over their appeals.

Their outlined argument is wrong.

The State of Idaho asserts, without analysis, that this Court has jurisdiction solely because this Court had jurisdiction over the State of Alaska's appeal in *Organized Village of Kake v. United States Department of Agriculture*, 795 F.3d 956 (9th Cir. en banc 2015). In its later-filed brief, the Sportsmen's Alliance adopts Idaho's overbroad interpretation of *Village of Kake*. The holding of *Village of Kake* simply does not apply to this case, for two separate reasons. Instead, the applicable holding is that the federal agency's acceptance of remand controls: when the United States accepts a remand, the Court does not have jurisdiction over attempted appeals by other parties. *E.g.*, *Pit River Tribe v. U.S. Forest Service*, 615 F.3d 1069, 1074-75(9th Cir. 2010).

Village of Kake stemmed from the United States Department of Agriculture's 2001 "'Roadless rule,' limiting road construction and timber harvesting in national forests." When it adopted the Roadless Rule, the "Department expressly found that

exempting the Tongass National Forest from this rule" would be improper. In 2003, after a change from the Clinton administration to the George W. Bush administration, the Department revisited the decision and exempted the Tongass National Forest from the Roadless Rule. It did so based upon the Record of Decision created in 2001.

In 2009, the *Village of Kake* brought suit challenging the 2003 decision. The United States defended the 2003 decision, i.e. the Obama administration defended the Bush administration's decision vacating the Clinton administration's decision. The District Court vacated the 2003 decision and reinstated the 2001 decision. It held that the 2003 decision, made without any change in the facts or record from 2001, was arbitrary and capricious.

The United States decided not to appeal the District Court decision. 795 F.3d at 963. The State of Alaska appealed, and the United States did not participate on either side in the appeal. *Id.*, *passim* (not referencing any federal action in the appeal); *see also* 9th Cir. case no 11-35517, Dkt. 51 (May 21, 2014) (letter from United States attorney informing the Court that the United States is was not participating in the appeal).

In its *en banc* decision, this Court held, consistent with well-established case law, that the threshold issue was whether it had jurisdiction over the case, and that

the Court needed to decide that threshold issue even though no party to the case had raised the jurisdictional issue. 795 F.3d at 963

There are two independent reasons why Idaho's conclusory citation to *Village of Kake* is insufficient. The first, very large, and very obvious difference is that in *Village of Kake*, the appealed order did not result in remand to the agency for further proceedings. The proceedings in the agency were done, and review and any remedy was therefore only before this Court. In contrast in the present case, the matter was remanded to the agency and as the United States has acknowledged, it is already, currently, working at the agency level on the remanded issues. Under the applicable case law, the choice of forum lies with the agency, not the other Appellants.

Second, in *Village of Kake*, this Court held that the State of Alaska had standing to appeal because the final reinstatement of the 2001 decision caused concrete economic harm to the State of Alaska. The scope of the majority holding on that issue is brought into clearer focus by Judge Callahan's dissenting opinion. Judge Callahan noted that there are three general bases for a state to bring suit: 1) "proprietary suits, in which states sue like private parties to remedy a concreted particularized injury 2) 'sovereignty suits,' . . . and (3) '*parens patriae* suits.'" *Id.* at 972. Judge Callahan noted that Alaska had no basis for a "sovereignty suit," and that the State could not bring a parens patriae suit when the United States, the superior "father," has chosen not to appeal. *Id.* at 977-78.

The "fighting issue" was whether the State of Alaska had standing based upon its propriety interests. The State of Alaska asserted it suffered enormous financial damage because the undisputed facts showed that the Roadless Rule substantially reduced logging in the Tongass Forest. Logs from those lands were sold, and the State had a share of the revenue from the sale of that natural resource. The State of Alaska asserted that it received millions of dollars per year from those sales. *Id.* at 963. The majority held that Alaska's concrete injury from loss of income from sales of the logs created the requisite concrete injury. *Id.* at 964. For relatively complex reasons, Judge Callahan disagreed.[3] *Id.* at 972-73.

Here, the State of Idaho does not even alleged, let alone establish, any redressable proprietary injury. Its only claim regarding monetary issues is a conclusory assertion, unsupported by any facts, that it has in the past spent state taxpayer funds to litigate to attempt to have the grizzly bears delisted and to comply with the purposes of the Endangered Species Act. Even if Idaho's assertion of past expenditures were true, it is unrelated to whether Idaho is financially injured by the District Court decision, let alone how this Court could redress that supported injury.

[3] Judge Callahan's concern was, with some oversimplification, that this Court had previously held that a state had concrete injury when it showed that the challenged federal act would result in loss of sales of a state-owned natural resources, but the majority was expanding that holding to provide that the State of Alaska had a concrete injury because it claimed it would receive less money from the United States for sale of a federally owned natural resource, where the Alaska received that money based upon a federal statute that did not, by itself, grant standing.

Idaho also asserts that it has a parens patriae interest in having grizzly bears delisted. But as Judge Callahan correctly noted, a State cannot assert parens patriae against the United States. *Id.* at 978 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485–86 (1923)).

The basis for jurisdiction in *Village of Kake* does not apply in this case. Idaho and the Sportsmen's Alliance have not put forward any other theory. Like the United States, Idaho might have been able to come up with some other arguments for jurisdiction which would not violate Rule of Appellate Procedure 41. If it had presented any other arguments, the Crow Tribe group would have then responded, and it is confident that there are no jurisdictional arguments which Idaho, the Sportsmen's Alliance, or the other Appellant could have presented which would have met the Appellants' threshold burden to establish that this Court has jurisdiction. But Idaho and the Sportsmen's Alliance chose not to present any other argument, and the only argument they outlined is insufficient to meet their burden.

C. OTHER INTERVENOR-DEFENDANT-APPELLANTS HAVE NOT PROVIDED ANY ARGUMENT FOR JURISDICTION.

Intervenor-Defendant-Appellants State of Montana, State of Wyoming, Wyoming Farm Bureau Federation, Wyoming Stock Growers Association, Charles C. Price and W&M Thoman Ranches LLC have not established that this Court has jurisdiction over their appeals.

Unlike the State of Idaho and Sportsmen's Alliance, the other non-federal appellants have not even outlined an argument for why this Court has jurisdiction. They therefore have not met their burden for all of the reasons discussed above related to the United States' failure to brief jurisdiction, and also for all of the reasons discussed above regarding the State of Idaho and Sportsmen's Alliance's failure to brief or to establish jurisdiction.

II. THE CROW TRIBE GROUP ADOPTS THE ARGUMENTS OF APPELLEE CONSERVATION GROUPS AND NORTHERN CHEYENNE TRIBE

If this Court were to reject the argument raised above, the Crow Indian Tribe, et al adopts the arguments of Appellee Conservation Groups and Northern Cheyenne Tribe. Consistent with this Court's rules and orders that the parties avoid minimize in briefing, the Crow Tribe group incorporates those arguments by reference.

CONCLUSION

Appellees have not provided any substantive argument that this Court has jurisdiction. Had they presented an argument the Crow Tribe group is confident it would have been able to rebut the argument, but the Court should simply hold that the failure of Appellants, represented by experience attorneys, to brief jurisdiction in a case where jurisdiction is plainly in doubt, leads to dismissal of their appeals.

Respectfully submitted this 5th day of August 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Circuit Rule 28.1-1(c) in that, according to the word-count feature of the word processing system in which the brief was prepared (Microsoft Word 2016), the brief contains 3,242 words, excluding the portions exempted by Rule 32(a)(7)(B). The brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman font.

By: */s/Jeffrey S. Rasmussen*
Jeffrey S. Rasmussen

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August 2019, a copy of the foregoing **ANSWERING BRIEF FOR PLAINTIFF-APPELLEES, CROW INDIAN TRIBE, et al** was served via the ECF filing system which will send notification of such filing to all parties of record, other than Robert Aland who will be served via email as consented to by him.

/s/ Jeffrey S. Rasmussen
Jeffrey s. Rasmussen