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

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CROW INDIAN TRIBE, et al.

Plaintiff-Appellees,

v.

UNITED STATES OF AMERICA, et al.

Defendant-Appellants,

and

STATE OF WYOMING

Intervenor-Defendant-Appellants.

On appeal from the United States District Court for the District of Montana
Case Nos. 9:17-cv-0089, 9:17-cv-0117, 9:17-cv-0118,
9:17-cv-0119, 9:17-cv-0123, and 9:18-cv-00016
Hon. Dana L. Christensen, U.S. District Judge

OPENING BRIEF OF APPELLEES THE HUMANE SOCIETY OF THE UNITED STATES AND THE FUND FOR ANIMALS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellees The Humane Society of the United States and The Fund for Animals hereby certify that neither organization has a parent corporation and that no publicly held corporation holds 10 percent or more of any Appellee's stock.

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JURISDICTIONAL STATEMENT

The U.S. District Court for the District of Montana ("District Court") had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because all claims raised below were federal questions arising under the judicial review provisions of the Endangered Species Act ("ESA"), 16. U.S.C. § 1540(g), and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706.

As to this Court's jurisdiction to hear the Federal Appellants' and Intervenor-Appellants' appeals, the Humane Society of the United States and the Fund for Animals ("Humane Society Appellees") incorporate by reference the Jurisdictional Statement of Appellees Alliance for the Wild Rockies, *et al*. In brief, this Court does not have jurisdiction over this appeal under 28 U.S.C. § 1331 for two reasons. First, Federal Appellants improperly seek an advisory opinion that would not reverse or amend the District Court's judgment vacating and remanding the challenged delisting rule. See NRDC v. Gutierrez, 457 F.3d 904, 905-06 (9th Cir. 2006) (finding appellants 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"). Second, because they lack independent Article III standing to appeal, Intervenor-Appellants' may not invoke this Court's appellate jurisdiction to defend a federal agency action for which the Federal Appellants have accepted vacatur

and remand. See Diamond v. Charles, 476 U.S. 54, 68-69 (1986); see also Alsea Valley All. v. Dep't of Commerce, 358 F.3d 1181, 1184-5 (9th Cir. 2004).

STATEMENT OF THE ISSUES

To avoid duplicative briefing and conserve judicial resources, this brief will address only issues pertaining to the Service's assessment of the "inadequacy of existing regulatory mechanisms," 16 U.S.C. § 1533(a)(1)(D), that Wyoming, Idaho, and Montana have in place to ensure the protection of grizzly bears upon federal delisting. The Humane Society Appellees adopt and incorporate by reference the briefing of consolidated Appellees Northern Cheyenne Tribe *et al*., WildEarth Guardians, and Alliance for the Wild Rockies *et al.* regarding the other issues on appeal. This brief discusses the following issues:

1. Whether the District Court correctly held that the U.S. Fish and Wildlife Service (the "Service") violated the Endangered Species Act and Administrative Procedure Act by finding that existing state regulatory mechanisms are adequate despite the lack of a "recalibration" provision, originally required by the Service, that would adjust population targets when a new population estimator is adopted;

2. Whether the Service acted arbitrarily, capriciously, or contrary to the Endangered Species Act by finding that existing state regulatory mechanisms are adequate after ignoring data in the record demonstrating that the human-caused mortality allowed under post-delisting management protocols constitutes a threat to the survival of the population.
3. Whether the Service acted arbitrarily, capriciously, or in violation of the Endangered Species Act by finding that unenforceable and non-binding state management plans and inter-state agreements are adequate "regulatory mechanisms."

STATEMENT OF THE CASE

This case carries dire implications for one of the country's most iconic species in one of the country's most iconic landscapes. At issue is whether the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 et seq., which requires agencies to make decisions about the status of species based solely on the best available science, permits the Service to abandon its well-reasoned position when faced with political push-back regarding which state regulatory mechanisms must be in place to protect the population once federal protections are removed. The record shows that the Service turned management of grizzly bears in the Greater Yellowstone Ecosystem ("GYE")

over to Wyoming, Montana, and Idaho despite its knowledge of several fatal deficiencies in the inter-state management regime that would govern the fate of this vulnerable population. In multiple instances, the Service ignored the best available science in order to accommodate state actors it regarded as partners in a negotiation. The ESA unequivocally forbids this approach.

While states certainly have a role in species management, the legal decision to change the status of a species under the ESA rests with the Service alone. The District Court vacated the delisting rule on these grounds, sparing grizzly bears from the threats of an imminent trophy hunting season and a management framework that the Service's own Grizzly Bear Recovery Coordinator deemed "biologically and legally indefensible," 6 JSER 1223, and a "major sellout of the science details necessary to assure…conservation of the Yellowstone grizzly." 6 JSER 1228-29. This Court should affirm that holding.

I. THE ENDANGERED SPECIES ACT

When Congress enacted the ESA, it sought "to provide a program for the conservation of…endangered and threatened species" and "a means whereby the ecosystems upon which [they] depend may be conserved." 16 U.S.C. § 1531(b). The Supreme Court recognizes the ESA as the "most comprehensive legislation for the preservation of endangered species ever

enacted by any nation." Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978) ("TVA").

The ESA and its implementing regulations demand a high standard of evidentiary and procedural rigor before species may be added ("listed") or removed ("delisted") from the federal list of threatened or endangered species. "A species may be delisted on the basis of recovery only if the best scientific and commercial data available indicate that it is no longer endangered or threatened." 50 C.F.R. § 424.11(d)(2); *see also* 16 U.S.C. § 1533(b)(1)(A). A delisting determination must consider the ESA's five categories of threats to a species – *i.e.*, habitat loss; overutilization for commercial or recreational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; and other natural or manmade factors affecting the species' continued existence – and the continued presence of any one threat requires continued listing. 16 U.S.C. § 1533(a)(1), (c); 50 C.F.R. § 424.11(d)(2). The ESA's best available science standard is "intended to remove from the process of listing or delisting of species any factor not related to the biological status of the species." N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv., 248 F.3d 1277, 1284-85 (10th Cir. 2001), quoting H.R. Rep. No. 97–567, pt. 1, at 29 (1982).

II. GRIZZLY BEARS UNDER THE ESA

Concern about the fate of grizzly bears in the continental U.S. helped motivate Congress to pass the Endangered Species Act in 1973. *See* TVA, 437 U.S. at 183-84 ("the continental population of grizzly bears … is surely threatened" and "[o]nce [the ESA] is enacted, the appropriate Secretary … will have to take action to see that this situation is not permitted to worsen, and that these bears are not driven to extinction'") (quoting 119 CONG. REC. 42,913 (1973)) (emphasis omitted). Promptly thereafter, in response to a petition filed by Appellee The Fund for Animals, the Service listed grizzly bears as "threatened" throughout the continental United States. E.R. 441. At that time, grizzlies in the lower-48 states had been extirpated from all but 2 percent of their historic range and had suffered a population decline from 50,000 to under 1,000 individuals. E.R. 89.

The Service first attempted to designate the Greater Yellowstone Ecosystem ("GYE") population of grizzly bears as a distinct population segment ("DPS") and remove it from the ESA's threatened species list in 2007. 72 Fed. Reg. 14,866 (Mar. 29, 2007). Conservation organizations successfully challenged that action in the Federal District Court for the District of Montana, which vacated the delisting in 2009. Greater Yellowstone Coal. v. Servheen, 672 F.Supp.2d 1105 (D. Mont. 2009). This Court affirmed that holding, chastising FWS for "tak[ing] a full-speed ahead, damn-the-

torpedoes approach to delisting – especially given the ESA's policy of institutionalized caution..." Greater Yellowstone Coal. v. Servheen 665 F.3d 1015, 1030 (9th Cir. 2011) (citation omitted) ("Greater Yellowstone Coal.").

The delisting rule challenged in this case and vacated by the court below represents FWS' second attempt to designate and delist Yellowstone-area grizzly bears as a DPS, even though grizzly bears in the remainder of the lower-48 states remain listed as threatened. 6 JSER 1168 ("Proposed Rule") (Mar. 11, 2016); E.R. 46 (June 30, 2017) ("Final Rule"). The Humane Society Appellees filed this lawsuit challenging the Final Rule on August 29, 2017. It was consolidated with lawsuits filed in the same court by Crow Indian Tribe *et al*., WildEarth Guardians, Northern Cheyenne Tribe *et al.*, and Alliance for the Wild Rockies *et al.* in December 2017, prior to the entry of judgment appealed here.

III. POST-DELISTING STATE MANAGEMENT

Without the benefit of the ESA's robust federal protections, grizzly bears in the GYE would be managed pursuant to several state and inter-agency mechanisms put in place by Wyoming, Idaho, and Montana (the "States"), as well as federal land management agencies. These include State management plans and regulations authorizing recreational bear hunting seasons and individual federal forest plans. At the core of post-delisting

management are two inter-agency instruments that were finalized during the course of the Service's rulemaking: the Conservation Strategy, which guides all aspects of post-delisting management, and the Tri-State Memorandum of Agreement ("MOA"), which purports to execute and implement provisions of the Conservation Strategy regarding allowable annual mortality (including by recreational hunters targeting bears as trophies, and state agents lethally removing them due to avoidable conflict with livestock operations).

The Conservation Strategy identifies two concentric zones inside the proposed DPS where occupancy by grizzly bears is "anticipated" and considered "acceptable": the core Primary Conservation Area ("PCA"), which includes Yellowstone and most of Grand Teton National Parks, and the broader Demographic Monitoring Area ("DMA"). E.R. 238, 240. The provisions of the Conservation Strategy and MOA apply only within the DMA, with some only applying within the PCA. E.R. 226-228. Management of GYE bears outside the DMA is not governed by the Conservation Strategy or any other inter-state agreement, only by plans and regulations adopted by individual states and national forests. Id.

The Conservation Strategy serves as the primary post-delisting management document, guiding all aspects of grizzly bear management and monitoring within the DMA. E.R. 83. It was developed by the Yellowstone

Ecosystem Subcommittee of the Interagency Grizzly Bear Committee[1] in parallel with the rulemaking process culminating in the Final Rule. Id. The Service solicited public comment on a draft Conservation Strategy published alongside the Proposed Rule in March 2016. 6 JSER 1169. After receiving and considering peer review and public comments on the Proposed Rule and draft Conservation Strategy, the Service determined that the ESA and best available science required the addition of a "recalibration" provision to the Conservation Strategy that would adjust "demographic standards…if the population estimator is changed post-delisting." 6 JSER 1236-38. In other words, the Service acknowledged that, to ensure fidelity with the Conservation Strategy's stated goal of long-term recovery, the population targets that measure whether GYE bears remain above the Service's threshold for recovery would need to be adjusted if a new formula for counting existing bears were adopted. The Service proposed such an amendment to Appendix C of the Conservation Strategy to the Yellowstone Ecosystem Subcommittee in October 2016, where it was met with opposition by State politicians, who proposed a competing amendment lacking a mandatory recalibration

[1] The Yellowstone Ecosystem Subcommittee is an interagency entity comprised of representatives from the Service, the five National Forests within the GYE, the two National Parks within the GYE, the three States' fish and wildlife agencies, county governments from each State, the BLM, and the Shoshone Bannock, Northern Arapaho, and Eastern Shoshone tribes. E.R. 89.

provision. 6 JSER 1235.1 ("[T]he 3 Governors cannot accept our final recommended recalibration language, and apparently, today, 3 state fish and game directors sent a letter to the YES chair urging that the WY language be brought to a vote at the YES meeting tomorrow."); see also 6 JSER 1237, 1239 1241-43, 1269-70. Following more than a month of unsuccessful attempts to persuade the States and the rest of the Yellowstone Ecosystem Subcommittee to adopt a mandatory recalibration provision, the Service capitulated to the States' obstinance and signed off on a final Conservation Strategy lacking any recalibration at all in December 2016. Public comment was not solicited on the final Conservation Strategy. E.R. 128.

SUMMARY OF ARGUMENT

The District Court's remand and vacatur of the challenged delisting rule should be affirmed for the following reasons, in addition to the reasons addressed by Appellees Northern Cheyenne Tribe *et al*., WildEarth Guardians, and Alliance for the Wild Rockies *et al.* and incorporated by reference herein:

I. The District Court correctly held that the Service unlawfully delisted GYE grizzly bears despite the absence of a key post-delisting management provision from the Conservation Strategy. The record demonstrates that the Service agreed that the best available science required a recalibration provision and its own experts expressed

grave concern at the prospect of delisting without this commitment in place. Rather than following the course of action demanded by the record, their own experts' opinions, and the ESA's best available science mandate, the Service negotiated an unlawful, unreasoned, and politicized concession in order to salvage the rulemaking process.

II. The District Court's judgment may be affirmed on the alternative grounds that the Service arbitrarily disregarded known and serious defects in the Conservation Strategy's management of human-caused mortality. The Service recognized that the Conservation Strategy's protocol would lead to serious and potentially undetectable population decline, as it unlawfully relied on the prospect of future study and "adaptive management" to address the problem post-delisting. The District Court erred in holding this claim foreclosed by this Court's prior decision in Greater Yellowstone Coalition.

III. The District Court's judgment may additionally be affirmed on the alternative grounds that the Service unlawfully relied on non-binding and unenforceable state measures to reach its determination

that GYE grizzly bears were not threatened by the "inadequacy of existing regulatory mechanisms."

STANDARD OF REVIEW

Review of delisting decisions under the ESA, 16 U.S.C. § 1540(g), is governed by the standards for review of agency actions under the Administrative Procedure Act ("APA"), pursuant to which an agency action "shall" be set aside when arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706. Under the APA,

> [A] decision is arbitrary or capricious… if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Gardner v. U.S. Bureau of Land Mgmt., 638 F.3d 1217, 1224 (9th Cir. 2011). In making this determination, the Court must determine "whether the Service, in reaching its ultimate finding, considered the relevant factors and articulated a rational connection between the facts found and the choices made." Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv., 475 F.3d 1136, 1145 (9th Cir. 2007) (internal quotations omitted) ("Nw. Ecosystem All."). "An agency action must be reversed when the agency has…entirely failed to consider an important aspect of the problem...." Ctr. for Biological Diversity v. Zinke, 868

F.3d 1054, 1057 (9th Cir. 2017) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("State Farm")).

Appellate review of a district court's grant of summary judgment is *de novo*. Greater Yellowstone Coal., 665 F.3d at 1023.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE SERVICE UNLAWFULLY FINALIZED DELISTING WITHOUT A RECALIBRATION PROVISION

The Service issued the Final Rule despite the absence of a recalibration provision in the Conservation Strategy – an omission that the agency itself recognized as a fatal deficiency. The omission was significant because the Service relied on its assessment of the Conservation Strategy to fulfill its mandate under the ESA to assess "the inadequacy of existing regulatory mechanisms" using "the best scientific and commercial data available" prior to delisting. 16 U.S.C. § 1533(a)(1)(D), 50 C.F.R. § 424.11(d)(2). By the Service's own reasoning, the best available science indicated that a Conservation Strategy lacking a recalibration provision would be inadequate and pose a grave threat to grizzly bears post-delisting. Based on those findings, the Service was obligated to halt the delisting.

The District Court arrived at the only conclusion that the record supports. The Service correctly found that the best available science required a

recalibration provision in the Conservation Strategy; indeed, as the District Court found, "the Service and other scientists viewed a recalibration provision as *essential*." E.R. 40 (emphasis added). The provision was sufficiently important that, without it, the Service deemed itself obligated to halt the ongoing rulemaking process because it could not make the requisite finding that state regulatory mechanisms would suffice to protect the delisted population. But despite the best efforts of the Service to explain the need for recalibration, the state signatories to the Conservation Strategy refused to include it in the final version. Faced with an impasse that threatened to delay the pending delisting rule, the Service blinked first and "chose to forego such a provision in order to get a deal with the states…not on the basis of science or the law, but solely in reaction to the states' hardline position on recalibration." Id. Because the record shows no evidence that the Service rationally changed its position on recalibration for any science-based reason, this Court should affirm the vacatur of the delisting rule on these grounds.

A. The Best Available Science Informed the Service's Reasoning that Recalibration Was Necessary to Ensure Adequate Post-Delisting Regulatory Mechanisms

Before the Conservation Strategy was finalized, the Service correctly recognized that the absence of a recalibration provision threatened to undermine the enterprise of post-delisting state management of grizzly bears.

The District Court observed that "the Service was aware that recalibration was a matter of significant concern…" E.R. 37. Indeed, the Service considered the omission so severe that its former Director called it a "show-stopper," and its former Grizzly Bear Recovery Coordinator wrote that it would render the pending delisting "biologically and legally indefensible." Id.; see also 6 JSER 1238, 1236-37, 1223, 1243. The Service's statements are not overly dramatic – they reflect an appropriate level of concern given the consequences for GYE's imperiled bears. Without recalibration, adoption of a new population estimator would cause the management mechanisms in the Conservation Strategy to become dangerously untethered from the conservation goals they were meant to achieve, allowing an unsustainably high number of bears to be killed each year – resulting in the Service's words, in "rapid managed population decline by overharvesting hundreds of bears." 6 JSER 1243.

The annual population estimate serves as the cornerstone of the Conservation Strategy. Fundamental components of the Conservation Strategy are tethered to each year's estimate. For example, the total number of bears that may be killed in any year (including "discretionary" trophy hunting and management removal kills) is calculated each year on a sliding scale according to the prior year's population estimate. E.R. 96. If the population estimate is less than 675 bears, then the next year's mortality limit is set at

15% of male and 7.6% of female bears; if the estimate determines that more than 747 bears exist, then allowable mortality rises to 22% of males and 10% of females. Id. Killing bears for "discretionary" purposes is prohibited entirely if the population estimate falls below 600. Id. Similarly, mandatory federal status reviews are triggered on an emergency basis if the estimated population drops below 500 bears. E.R. 95.

The methodology used to derive annual population estimates is thus vitally important because it significantly and immediately affects life-or-death management policies on the ground. The Conservation Strategy's baseline limits for allowable mortality, status reviews, and other key safeguards were set according to estimates derived from the "Chao2" method, which has been in use by federal managers since 2002. E.R. 261-62. The draft Conservation Strategy further specified that annual post-delisting estimates would continue to use the Chao2 method unless and until the best available science recommended an updated protocol, a provision removed from the final Conservation Strategy. 6 JSER 1228.

Before the Conservation Strategy was finalized, the Service became aware of a flaw: even if an updated population estimate became available, adopting it without "recalibrating" the underlying Chao2-based population targets and thresholds in the Conservation Strategy to match would render

them meaningless and ineffective, with potentially devastating consequences for bears. Because Chao2 is a notably "conservative" estimator, any change in methodology would almost certainly estimate a substantially higher population. If the Conservation Strategy's population targets and thresholds are not recalibrated, then the sudden surplus of estimated bears generated by a change in accounting methods would abruptly and radically inflate permissible mortality levels.

By adopting a new estimator without recalibration, the Conservation Strategy allows states to grant themselves permission to kill *hundreds* of additional grizzly bears without any change in conditions on the ground. As the District Court explained, "if a new model estimates 1000 bears where Chao2 found 700, the states will be able to treat the jump in population…as if 300 new individuals had moved into the Greater Yellowstone Ecosystem" overnight. E.R. 36. This concern is not merely theoretical; calculating the consequences of adopting one leading alternative to Chao2 (without recalibration), one grizzly bear expert warned that "[a] population that the Service currently represents as numbering around 675 could suddenly be inflated to over 925, thereby allowing for a [67% increase in] sport harvest" and "even more problematic, a population at the threshold of 500, that the Rule claims might trigger a status review by the Service, could be suddenly

increased to 700, well above such a trigger." 6 JSER 1253 (comments of Dr. David Mattson, on behalf of Wyoming Wildlife Advocates). A peer reviewer assessing the proposed delisting rule and draft Conservation Strategy raised similar issues, flagging the "need to calibrate any new estimation method with the previous approaches to ensure long-term comparability of data." E.R. 375.

The record unequivocally shows that the Service also believed that the best available science required recalibration for the Conservation Strategy to be deemed adequate. Following public comment and peer review on the draft Conservation Strategy, the Service proposed the inclusion of a recalibration provision in the final Conservation Strategy. 6 JSER 1236-37. Service scientists and officials uniformly recognized the need for such a provision. Its former Grizzly Bear Recovery Coordinator explained that omitting recalibration "is biologically and legally indefensible" as illustrated by past population data: "[t]he 2007 population estimate using Chao2 was 683, but there were actually over 1200 bears in the population in 2007 if we used [another method called] mark-resight," such that *without* recalibration "the states could reduce 1200 bears to 683" using trophy hunting and other discretionary killing methods. 6 JSER 1223. The same official – whose role was to oversee the Service's entire grizzly bear recovery program – observed that omitting recalibration "is completely unacceptable and will not pass peer

review or the red face test." 6 JSER 1254. Service field biologists tasked with working on grizzly bear recovery agreed. See 6 JSER 1256 (Service recovery biologist: "Can't keep floor of 600 if population estimate doubles with new estimator.").

Correspondence between high-level Service officials and key federal land management agencies further illustrates both the Service's strong and well-reasoned commitment to recalibration and its peer agencies support of the same. During the impasse that occurred between July and November of 2017, the former Director of Yellowstone National Park wrote that "some current estimates place as many as 1,100 bears in the DMA. This would [without recalibration] trigger the much higher mortality rates and drive the population down over a relatively short period of time," to which the former Director of the Service responded "rest assured, we'll get the recalibration issue locked down." 6 JSER 1268-70; see also 6 JSER 1271 (NPS official: "We firmly believe that we would need to recalibrate the minimum population threshold if a new method results in a new higher population estimate."). And the U.S. Forest Service – who, together with the National Park Service, manages the vast majority of grizzly bear habitat within the DMA – warned that without recalibration, states "could potentially manage a decline from

1,000 to 600 [bears],” putting “genetic issues…back on the table.” 6 JSER 1273-74.

Despite the strong scientific rationale indicating the need for a recalibration provision in the Conservation Strategy, the States resisted the Service’s proposed amendment; neither proposal passed at the November 4 YES meeting. 6 JSER 1277-79. In the leadup to that meeting, senior Service staff characterized the absence of recalibration as a “show-stopper,” without which delisting could not lawfully proceed. 6 JSER 1238. The Director of the Service wrote that “recalibration of the demographic standards…if the population estimator is changed post-delisting” was, in the Service’s view, “a key commitment that must be clear in the [Conservation Strategy] in order to ensure that the states are committed to the basic goal of maintaining the delisted population of bears.” 6 JSER 1235.1. He continued: “It is much clearer, and frankly scientifically warranted, to just state clearly that if the population estimator is changed we will recalibrate. Why the states are unwilling to make this commitment, frankly, is quite concerning.” 6 JSER 1236.

In sum, the District Court accurately assessed the record when it held that “all the evidence…supports the Plaintiffs’ position that…the Service and other scientists viewed a recalibration provision as essential.” E.R. 40. Indeed,

the record demonstrates that the Service's field biologists, long-time grizzly bear specialists, regional managers, and high-ranking officials uniformly agreed (along with expert public commenters, peer reviewers, and other federal agencies) that a Conservation Strategy lacking a recalibration provision would be inadequate and pose a threat to the population. The Service's decision to proceed with delisting without such provision unlawfully failed to "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choices made.'" Nw. Ecosystem All., 475 F.3d at 1145. In apparent acknowledgement of this fact, Federal Defendants have not appealed the District Court's holding on these grounds.

B. The Service's Acquiescence to the Removal of Recalibration from the Final Conservation Strategy Was Arbitrary, Lacked Rationale, and was Not Based on the Best Available Science

The Service was ultimately unable to persuade the signatories to the Conservation Strategy to include a recalibration provision. The Final Conservation Strategy not only failed to provide for recalibration if the population estimator were changed, but also removed the "best available science" standard for changing the estimator at all. The Service could have responded to this "show-stopper" by stopping the show – but it did not. 6 JSER 1238. Therein lies the legal error for which the District Court correctly vacated the Final Rule, a conclusion not contested by Federal Defendants. The

Service was legally obligated to determine, based on the best available science, that the population at issue was not threatened by the "inadequacy of existing regulatory mechanisms." 16 U.S.C. §1533(a)(1)(D), 50 C.F.R. § 424.11(d)(2). Rather than doing "[its] job…to ensure the law and regulation are faithfully executed" by refusing to delist in the absence of a mechanism necessary "to the goal of maintaining a stable population," the Service impermissibly prioritized political expedience and accepted a negotiated compromise that fell short of what it correctly believed to be the demands of the best available science. 6 JSER 1280. Because "the Service cannot negotiate away its obligation to make decisions solely on the basis of the best available science," the Final Rule violated the ESA and APA. E.R. 40.

The record makes plain that, upon realizing that it could not marshal the votes to overcome state resistance to including a recalibration provision in the Final Conservation Strategy, the Service "accepted a 'compromise' that was in effect a capitulation." E.R. 39. Minutes from meetings of the Yellowstone Ecosystem Subcommittee ("YES") highlight that the recalibration issue was treated as a contractual provision to be negotiated by committee members. *See* 6 JSER 1276-79.

Contemporaneous emails in the record illustrate the fundamentally political nature of the fight over recalibration language, which the Service

itself even characterized as "negotiated" in October 2016. 6 JSER 1273. Discussions among high-ranking Service staff reveal that opposition to recalibration originated with "the 3 Governors," 6 JSER 1235.1, who intervened to address the issue with the Service directly. 6 JSER 1285. State governors were in turn responding to internal pressure from special interest groups seeking to minimize the number of bears on the landscape:

> All of the discussions over the past several months have revolved around state-based political concerns about how the livestock, outfitter, and sportsmen (using that term very loosely) communities are reacting. While we've tried to be sensitive to the states concerns about these perspectives, our job is to ensure the law and regulation is faithfully executed. I'm feeling, increasingly, that we have reached a point where they simply must choose to go forward, or not.

6 JSER 1280; see also 6 JSER 1239 (Service Assistant Director email to Service Director: "The Governors are all in agreement that they cannot accept our recalibration language. ([Wyoming governor's assistant] said that he had all the WY interests in agreement to accept our language two days ago, but a WG&FD Commissioner managed to blow it all up. So close.)").

The political constituencies motivating State opposition are spelled out in another October 2016 email reviewing State edits to the Service's proposed recalibration language:

> The strikethrough…came from WYG&F at the 11th hour…That new language in red is [the Wyoming governor's assistant's] best effort to kick the can down the road for those parties (livestock industry,

> sportsmen) who want fewer grizzlies on the landscape. This language is acceptable to MT, but not to ID (altho [sic] it has not been vetted with Gov. Otter yet).

6 JSER 1241-42.

The Service Director resignedly described the eventual outcome – a final Conservation Strategy without recalibration – as representing merely "the strongest agreement [the Service] could get." 6 JSER 1289 The Service's former grizzly bear coordinator used less reserved language, observing that the agreed-upon language "Removed wording from Appdx. C about a change in [population estimator] methods requiring the best available science. Why? **Can drive a truck through this!,"** "Ignores what will happen if a new estimator becomes available. It is obvious what the states plan is," and finally characterizing it as "a major sellout of the science details necessary to assure conservation of the Yellowstone grizzly." 6 JSER 1228-29 (emphasis in original).

C. The Service's Abandonment of Recalibration Was Not the Outcome of Scientific Debate

Intervenor-Appellants stretch the record beyond its breaking point in an attempt to characterize the Service's decision to proceed with delisting in the face of a fatally flawed Conservation Strategy as the outcome of a "healthy, robust debate," Dkt. No. 63, at 24, rather than a negotiated "concession" and "capitulation." E.R. 36, 39. But they fail to point to record evidence proving

that the Service changed its position on recalibration on *any* reasoned basis, let alone a basis sufficient to overcome its well-founded scientific concerns. At most, these arguments serve only to prove that the Service accepted the compromise language. But that has never been in dispute. Intervenor-Appellees fail to show that the Service justified the compromise using the best available science, or that the Service made any findings that the compromise language addressed the concerns motivating its insistence on recalibration in the first place. The mere fact that the Service signed off on a Conservation Strategy that lacked recalibration falls far short of "articulat[ing] a rational connection between the facts found and the choices made'" by the Service. Nw. Ecosystem All., 475 F.3d at 1145.

The first source invoked by Intervenor-Defendants is a November 2016 email from Director Ashe discussing the eventual compromise language enacted in the Final Conservation Strategy. 6 JSER 1289; *see* Dkt. No. 63, at 25. But the District Court interpreted this email correctly; if anything, it proves only that the Service accepted a compromise - "the strongest agreement we can get" – that fell short of a commitment to recalibration. 6 JSER 1289. The supposed benefits of the compromise enumerated in that email fail to address the core concern that the Service expressed about recalibration: that adoption of a new estimator will render the Strategy's

population thresholds meaningless and ineffective. At best, this email represents the Director reaching for a silver lining after losing the fight to win state support for recalibration. But even the supposed silver lining is inaccurate – the Director's claim that "if/when the population grows, the harvest targets will become proportionately smaller," id., is belied by the Strategy, which in fact allows mortality at a *higher* proportion of the population as the population grows. E.R. 259. This email does not – because it cannot - explain why the compromise language addresses the underlying problem. It thus fails to provide a reasoned explanation for the Service's capitulation, merely proving that FWS illegally treated its statutory duty as a negotiation, settling for "the strongest agreement [it] can get" despite its legal and scientific inadequacies. 6 JSER 1289.

Similarly, the second source cited by Intervenor-Appellants – the Final Rule's conclusory treatment of recalibration – is thinly supported and does not rationally explain the evaporation of the Service's view that the best available science demanded recalibration. *See* Dkt. No. 63 at 26; Dkt. No. 59 at 51-52; Dkt. No. 74 at 23. This supposed explanation comes in the form of a single paragraph in the Final Rule discussing the alleged impracticality of recalibration: "the recalibration language…was removed because it was determined to be too prescriptive as it would require data from 2000 to

2014… It is likely that any new method would require data that are not currently collected, and, therefore, retroactive estimation using the new method would not be possible." E.R. 147. But the Rule does not support this speculation with any evidence – the Service has no way of knowing if some yet-undeveloped future estimator would require data that was not collected from 2002-2014. In fact, the record only allows for the opposite conclusion. The Interagency Grizzly Bear Study Team possesses a trove of information for that time period since it has collected data according to four different monitoring and evaluation methods, only one of which is Chao2. E.R. 146, 158. This is how Study Team scientists have been able to do the very thing the Final Rule states is impossible: retroactively apply non-Chao2 population estimators to the 2002-2014 time period using their rich data set. 6 JSER 1293-94. The Final Rule acknowledges that Greater Yellowstone's bears are "the most studied bear population in the world," and fails to explain why existing data from 2002-2014 is insufficiently robust to allow for recalibration in the future. E.R. 204. Thus, neither of the sources Intervenor-Appellants point to provide a basis grounded in record evidence for the Service's eventual concession to delist without a recalibration provision in post-delisting regulatory mechanisms.

Even if the record *did* contain evidence to support the notion that

perfectly implementing recalibration using a new population estimator would be difficult or impossible, this would still not excuse the Service's capitulation on the issue. The Service identified the effect of a changing population estimator as a threat to the population sufficient to single-handedly render delisting legally unwarranted. The Service and the states' inability to devise a solution that would satisfactorily neutralize that threat does not render it any less threatening, or any less an impediment to delisting; the ESA only permits delisting when the best available science indicates a threat does not exist, not when threats exist but nothing can be done about them at the time of delisting. Furthermore, the alleged impossibility of implementing a strict recalibration provision would not foreclose a less stringent approach that, at minimum, committed in principle to preserving the integrity of the Strategy's population targets when the estimator is changed. As the District Court noted, "while it is likely true that the mathematical formula for recalibration cannot be determined until a new estimator is selected, that has no bearing on the parties' ability to address recalibration as a general matter – even if it is only to state a commitment to recalibration." E.R. 38.

Finally, Intervenor-Appellants object to the District Court's characterization of the Service's abandonment of recalibration as based on "political pressure." See Dkt. No. 59 at 36-41. But the Service's own

description of the States' resistance to recalibration supports the "political pressure" reading: for example, at one point, the Wyoming governor's office had "all the WY interests in agreement to accept our language…but a WG&FD Commissioner managed to blow it all up," leading the state to make a counteroffer as an "effort to kick the can down the road for those parties (livestock industry, sportsmen) who want fewer grizzlies on the landscape." 6 JSER 1239, 1283-84. The District Court accurately described the Service's decision as the outcome of a negotiation: "a concession to the states in order to reach a deal." E.R. 33. Whether one interprets the Service's compromise as a result of political pressure applied by state Governors on behalf of special interests, negotiation among sovereigns to resolve an impasse, or haste to conclude a pending rulemaking before a change in administration, the legal implication is the same: none may take the place of the detailed consideration of the best available science mandated by the ESA.

Substantial and powerful record evidence illustrates the Service's principled, science-based commitment to recalibration. Intervenor-Appellants invoke sparse and unpersuasive sources—a few conclusory statements about the results of failed negotiations, unhinged from any record evidence relating to sustainability of the species—to justify the final compromise as anything other than a negotiated concession. The record establishes that the Service

viewed recalibration as essential for scientifically sound and well-articulated reasons; the Service tried, but failed, to convince signatories to the final Conservation Strategy to adopt a recalibration provision; the Service felt that the negotiated replacement for recalibration represented only "the best deal [it] could get" with the states; and the Service proceeded to delist the population. The Service's former grizzly bear recovery coordinator accurately characterized this decision as "a violation of the mandate of the ESA that the Service [ensure] adequate regulatory mechanisms prior to delisting." 6 JSER 1286. Its inability to control the final content of the Conservation Strategy did not excuse the Service of its obligation to evaluate it according to the best available science. And, the best available science indicates that the recalibration provision is an essential element of post-delisting regulatory mechanisms, whether or not the states are willing to agree to it, and without which delisting is not justified.

D. The Final Conservation Strategy's Stated Commitment to the Chao2 Estimator "for the foreseeable future" Does Not Suffice to Replace Recalibration and Does Not Cure the Service's Legal Error

In place of a commitment to recalibration, the final Conservation Strategy instead provided that the states would continue to use the Chao2 estimator "for the foreseeable future." 6 JSER 1368. But this provision – deemed by the Service a "compromise" representing "the best agreement the

Service can get" with the states – is a woefully insufficient substitute that does not resolve the underlying scientific concerns which animated the Service's insistence on recalibration. 6 JSER 1289. Because the record does not indicate that the Service considered this compromise scientifically adequate to address these concerns, the Service's decision to delist violated the ESA.

Intervenor-Appellants argue that the "compromise" commitment to use the Chao2 for the foreseeable future provides adequate assurance that bears will not be threatened by the Conservation Strategy's failure to commit to recalibration. Even assuming their arguments have merit, they are *post hoc* rationalizations that do not represent the reasoned position of the Service at the time the decision to abandon recalibration was made. As discussed in subsections (B) and (C) above, the Service did not put forward these justifications before finalizing the rule; indeed, the administrative record is entirely bereft of evidence that the Service rationally changed its position on recalibration for these or any other science-based reasons. The relevant question before this Court is whether the *Service* provided adequate rationale for this about-face. The record indicates that the Service's "absence of a reasoned explanation for disregarding previous factual findings violates the APA." Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 969 (9th Cir. 2015); see also W. Watersheds Project v. BLM, 181 F. Supp. 3d 673,

680 (D. Ariz. 2016) (*post-hoc* rationalization may not "cure the deficiencies" in faulty agency rationale).

Even if the Service had put forward these arguments as the rationale for its decision to abandon recalibration, they would not suffice to explain the change in position. The use of Chao2 "for the foreseeable future" fundamentally cannot substitute for recalibration because it *does not require recalibration*. At best, this language only *delays*, but does not prevent, the population-threatening consequences that will result when a new population estimator replaces the conservative Chao2 without a guarantee that population targets will be recalibrated. Under the compromise, the very same scenario the Service deemed "biologically indefensible" will still occur when the population estimator is changed. Committing to wait for an undefined period of time before changing estimators does not address the Service's concern about recalibration; it only kicks the can down the road. Because the threat identified by the Service remains even if Chao2 is used for a decade or more, the Service was obligated to maintain the population's "threatened" status.

Even if the ESA permitted this sort of punting, the Conservation Strategy does not delay the problem very long because it does not define the key term "foreseeable future." 6 JSER 1368, contra 6 JSER 1289 (Service Director erroneously stating that Conservation Strategy defines "foreseeable

future"). Without a concrete definition in place, the Service had no reasoned basis to evaluate how significant a commitment the compromise truly was. Indeed, the record discloses no attempt by the Service to explain or justify its interpretation of, and reliance on, the "foreseeable future" commitment, including key questions like whether new estimators were currently being developed and whether the States would have an incentive or need to adopt a new estimator once available. The importance of this missing explanation is underscored by the fact that the ultimate decision about when the "foreseeable future" has changed and a new population estimator may be adopted rests with a body in which the Service does not even have a vote, let alone a controlling interest. 6 JSER 1280 (newly formed Yellowstone Grizzly Coordinating Committee will make decision to adopt new estimator); E.R. 89 (composition of YGCC).

Moreover, the nature of the subject matter may render this term functionally meaningless. The precise estimator that will eventually take the place of Chao2 is not yet known and may not have yet been developed. It follows that a change in estimators is arguably not yet in the "foreseeable future." But that will change once a new estimator is developed – and, as one peer reviewer noted, "[d]evelopment of population estimation methods is an active field." E.R. 375. In fact, the record indicates both that the Interagency

Grizzly Bear Study Team has actively been developing alternative estimators and anticipates changing estimators post-delisting. 6 JSER 1294 ("anticipated" change to mark-resight post-delisting), 1299 (detailing ongoing development of mark-resight estimator by IGBST in "response to a request by bear managers in the GYE for some relief relative to mortality limits"), 1301 ("The consensus among the Study team is to start using [mark-resight] for annual estimation of the Yellowstone grizzly bear population.")

Finally, Intervenor-Appellant Wyoming attempts to wave away the recalibration issue entirely by arguing that the temporal scope of the ESA only permits the Service to consider threats that may present themselves "within the foreseeable future." 16 U.S.C. § 1532(20). Dkt. 59 at 33-36, Because the Conservation Strategy provides for the use of Chao2 "for the foreseeable future," Wyoming argues that any threat associated with the change in population estimator is outside the permissible scope of the Service's analysis. Id. First, as argued above, merely stating that the estimator won't be changed within the "foreseeable future" does not make it so; in fact, record evidence suggests that a change in estimator is not only foreseeable but likely. Second, Wyoming puts forward no argument for why the term "foreseeable future," undefined in the Conservation Strategy, must be interpreted identically as that term in the ESA. Extensive case law interpreting "foreseeable future" in the

ESA context demonstrates why Wyoming's slight-of-hand fails. Courts have upheld listing decisions based on interpretations of "foreseeable future" extending to time horizons exceeding fifty years, when supported by "reliable data" and conforming to the ESA's best available science standard. See Alaska Oil and Gas Ass'n. v. Pritzker, 840 F.3d 671, 681-682 (9th Cir. 2016); see also Alaska v. Lubchenco, 825 F.Supp.2d 209, 221 (D.D.C. 2011) (listing upheld where model projected 1 percent risk of extinction in 50 years, 26 percent risk in 100 years, and 70 percent risk in 300 years). Here, the record shows that the Service failed to explain at all, let alone using "reliable data", why the threat of a changing population estimator falls outside of the range of foreseeability as that term is applied by the ESA.

The compromise language committing to Chao2 for the foreseeable future may represent the "best Agreement the Service [could] get," 6 JSER 1289, but neither the Intervenor-Appellants nor the Service can show that it is good enough to compensate for the absence of recalibration. Neither the record evidence nor a close reading of the plain text of the compromise itself supports the Service's decision to negotiate away its science-based commitment to recalibration. Therefore, the delisting rule must remain vacated.

E. Other Provisions in the Final Conservation Strategy Do Not Obviate the Need for Recalibration

Intervenor-Appellants seek to distract from the Service's about face on recalibration by pointing to other provisions of the Conservation Strategy which do not obviate the need for recalibration. See Dkt. 59 at 32-33; Dkt. 74 at 21, 25. But the Conservation Strategy's commitments to "manage for around 674 bears in the [DMA]," "stop all discretionary mortality…if the total population size drops below 600 bears," and "suspend grizzly bear hunting with the [DMA] if the mortality limit…is met in a given year," even if generally protective in nature, do not address the threat posed by changing population estimators without recalibration. Dkt. 59 at 32-33. In fact, these provisions only serve to underscore the need for recalibration. As the Service was aware, the adoption of a new population estimator will almost certainly inflate the annual population estimate. Without recalibration, this effect will in fact undermine each of the three mechanisms identified by Intervenor-Appellants, because the population target of 674 bears and discretionary mortality floor of 600 bears will not have been adjusted to match the new population estimate, and the mortality limit governing hunting quotas will have been inflated by the adoption of a new estimator. Far from serving as a backstop against the threat of a changing estimator, these examples serve only to highlight that the fundamental importance of annual population estimates to

various mechanisms in the Conservation Strategy renders recalibration essential.

F. The District Court's Reasoning on Recalibration was Not Unduly Speculative

The District Court's explanation for the necessity of a recalibration provision matches the Service's own reasoning before its negotiated about-face: changing population estimators without recalibrating the underlying population targets to match will cause a sudden inflation in the estimated population. E.R. 36. This will prove disastrous for bears because, among other reasons, the Conservation Strategy ties annual mortality allowances to the population estimate, such that a sudden increase in the estimate will generate a sudden increase in allowable hunting quotas, management removals, and other sources of grizzly bear deaths. *Id*. As discussed in subsection A above, this reasoning is uniformly supported by the best available science in the record, including statements by Service biologists and outside experts.

Ignoring this substantial body of evidence, Intervenor-Appellants contend that the District Court improperly based its analysis of the recalibration question on bare speculation as to (1) the likelihood that the States would choose *not* to recalibrate when a new estimator is adopted, and (2) whether that change will result in the predicted inflation of the population estimate. Dkt. No. 56 at 26-27; Dkt. No. 63 at 21-22. Even if this were true, it

would not dislodge the core of the District Court's holding: that the Service illegally "negotiate[d] away its obligation to make decisions solely on the basis of the best available science." E.R. 40. The relevant inquiry is whether the Service's abandonment of recalibration was based on a change in its interpretation of the best available science, or on a negotiated compromise that is unmoored from science-based record evidence. Intervenor-Appellants' *post hoc* attempts to diminish the threat posed by a changing population estimator do not affect this analysis because they were not put forward by the Service as an explanation for its action and are not supported by the record, and thus cannot be used to uphold the delisting rule.

In any case, the record adequately supports the District Court's reasoning on each issue. First, the voluminous record evidence detailing the States' knock-down, drag-out opposition to including recalibration in the Conservation Strategy (see subsection B above) supports and nearly *requires* the inference that the States would not voluntarily recalibrate if not required by the text of the Conservation Strategy to do so. Second, it is universally acknowledged that Chao2 is a "highly conservative" estimator – more conservative than any other currently known protocol – such that the adoption of a new estimator will almost certainly result in a sudden and significant inflation of the estimate. E.R. 261-262; 6 JSER 1253.

The Intervenor-Appellants' cries of "speculation" also fail because the ESA still requires ongoing listing even where the "best available scientific evidence" indicating a threat falls short of "absolute scientific certainty." Ctr. For Biological Diversity v. Lubchenco, 758 F.Supp.2d 945, 965. (N.D. Cal. 2010). Even if the record evidence indicating the threat posed by not recalibrating "were quite inconclusive," the Service "may – indeed must – still rely on it." Id. Grizzly bears are threatened with extinction, and a precautionary approach is mandated by the ESA.

G. The District Court Applied the Correct Legal Standards in its Analysis of the Recalibration Issue

The District Court correctly determined that "rather than rationally consider and apply the best available science, as demanded by the APA and the ESA, the Service made a concession to the states to secure their participation in the Conservation Strategy." E.R. 36. This was a proper application of the ESA and its implementing regulations. 16 U.S.C. § 1533(b)(1)(A); 50 C.F.R. § 424.11(d) (delisting action "must be supported by the best scientific and commercial data available"). Here, the best available science indicated that, without recalibration, GYE bears would be threatened by "the inadequacy of existing regulatory mechanisms." 16 U.S.C. § 1533(a)(1)(D); 50 C.F.R. § 424.11(c)(4), (d). Delisting was therefore

prohibited under the ESA and Service regulations, because "a species may be delisted on the basis of recovery only if the best scientific and commercial data available indicate that it is no longer endangered or threatened." 50 C.F.R. § 424.11(d)(2). The ESA does not grant the Service the discretion to "negotiate away its obligation to make decisions 'solely on the basis of the best available science.'" E.R. 40, citing 16 U.S.C. § 1533(b)(1)(A). Indeed, the ESA's best available science standard is specifically "intended to remove from the process of the listing or delisting of species any factor not related to the biological status of the species." N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv., 248 F.3d 1277, 1284 (10th Cir. 2001) (citation omitted). Because the Service's eventual acceptance of a final Conservation Strategy lacking recalibration was the product of political horse-trading and not the rational application of the best available science, it violated the APA and ESA.

Intervenor-Appellant Montana contends that the District Court misapplied the best available science standard, arguing that the Service's initial concerns about recalibration were not scientific in nature but rather "a concern about future management decisions." Dkt. No. 56 at 22-23. But the ESA does not distinguish between "scientific" and "management" issues. Quite the opposite: the plain text of the statute directs that the Service

evaluates the "inadequacy of existing regulatory mechanisms…solely on the basis of the best scientific and commercial data available," not only contemplating but *mandating* that the post-delisting management landscape be assessed scientifically. 16 U.S.C. 1533(a)(1)(D), (b)(1)(A). Here, the Service's concern about recalibration was premised on fundamentally scientific concerns raised by agency and outside experts. See 6 JSER 1223 (Service grizzly recovery coordinator: delisting without recalibration would be "biologically indefensible" and "will not pass peer review"), 1243, 1256 (Service recovery biologist: "Can't keep floor of 600 if population estimate doubles with new estimator."), 1236 (Service Director: it is "frankly scientifically warranted, to just state clearly that if the population estimator is changed we will recalibrate."); see also 6 JSER 1253, E.R. 375 (public comment and peer review from outside bear biologists expressing need for recalibration). Because the record shows that "the Service and other scientists viewed a recalibration provision as essential," E.R. 40, the District Court correctly concluded that abandoning it violated the ESA's best available science mandate.

The District Court was also correct in considering the missing recalibration provision a defect in the "existing regulatory mechanism" of the Conservation Strategy. Montana emphasizes that Conservation Strategy

commits to using Chao2 for now, such that a change in estimator would constitute a "future regulatory change" outside the scope of the ESA's mandate to assess the "inadequacy of existing regulatory mechanisms." Dkt. No. 56 at 26, 29, *citing* 16 U.S.C. § 1533(a)(1)(D). But the absence of recalibration is codified in the presently existing final Conservation Strategy; Montana's position seems to be that the Service is not permitted to consider the future impacts of current regulatory mechanisms. This is contrary to the structure and intent of the ESA. The very nature of listing and delisting decisions requires the Service "to make a prediction about the future persistence of the species," and "consideration of whether a species should be listed depends in part on identification and evaluation of future actions that will reduce or remove, as well as create or exacerbate, threats to the species." Rocky Mountain Wild v. Walsh, 216 F. Supp. 3d 1234, 1250 (D. Colo. 2016). Moreover, the ESA's "policy of institutionalized caution" not only allows but *requires* the Service to take preventative measures to protect species even when the "best available scientific evidence" indicating a threat falls short of "absolute scientific certainty." Ctr. For Biological Diversity v. Lubchenco, 758 F.Supp.2d at 971 (N.D. Cal. 2010).

Montana's reductive interpretation of the term "existing" is no better supported by the cases cited in the state's brief. The Center for Biological

Diversity v. Lubchenco court in fact upheld the National Marine Fisheries Service's reliance on climate models that assumed some degree of future regulatory action. Id. at 965-66 ("Plaintiffs argue that NMFS erred in relying on climate models that assumed different greenhouse gas emission scenarios which rely on some type of regulatory control in the coming years…NMFS did not err in determining that future regulatory measures did not justify extending the foreseeable future beyond 2050."). And the Oregon Natural Resources Council court merely held that the Service could not rely on the "hope" of future protective legislation as a basis for defer listing a species. Oregon Natural Resources Council v. Daley, 6.F.Supp.2d 1139, 1152 (D. Or. 1998). Here, by contrast, the District Court was not speculating about a hypothetical provision in a yet-to-exist regulatory mechanism. It was assessing the faults of the presently existing Conservation Strategy, using the best available science included in the record to evaluate threats that bears would face under its post-delisting management regime.

Finally, the District Court did not, as Intervenor-Appellants Wyoming and National Rifle Association contend, improperly substitute its own judgment for, or fail to properly defer to, the judgment of the Service. Dkt. No. 59 at 49-52. at 41-44; Dkt. No. 74 at 33. To the extent that the record illustrates a "judgment" by the Service to which deference is due, that

judgment is *in favor of* recalibration, not against it. As discussed in subsections A and B above, the Service put forward compelling arguments *for* recalibration in the record, but only scattered and half-hearted explanations of why the Final Conservation Strategy represented the "best deal the Service [could] get." Even if the Service were deemed to have offered a "judgment" (rather than a negotiated compromise) against the necessity of recalibration, deference would not be appropriate. Even when "an agency is operating in a field of its expertise," deference is not due if, as here, "the agency's reasoning is irrational, unclear, or not supported by the data it purports to interpret." Nw. Coal. for Alts. to Pesticides v. EPA, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008) (citation omitted). As the District Court held, "*even under the deferential standard* demanded by the ESA, the Court cannot conclude that the failure to address recalibration is anything other than a failure of reasoned decisionmaking." E.R. 33 (emphasis added).

The District Court correctly held that the Service's acceptance of a Conservation Strategy without recalibration was the outcome of negotiation, not reasoned application of the best available science. Intervenor-Appellants point to no evidence in the record disproving that the Service effectively traded away their obligation to apply the best available science in order to secure the adoption of a final Conservation Strategy. At most, Intervenor-

Appellants' defenses of the eventual compromise amount to irrelevant *post hoc* rationalizations that do not represent the Service's rationale for changing course, and in any case do not rebut the established scientific necessity of recalibration for the long-term recovery of the population. The District Court's judgment should thus be upheld.

II. THE DELISTING RULE MAY BE VACATED BECAUSE THE CONSERVATION STRATEGY ALLOWS AN EXCESSIVE AND POPULATION-THREATENING LEVEL OF HUMAN-CAUSED MORTALITY

The Conservation Strategy contains a second fatal flaw: its allowance of high annual levels of male mortality that will go unaccounted for by a population estimator which counts only females, leading to a snowball effect that, like the absence of a recalibration provision, threatens to unravel decades of progress toward grizzly bear recovery. The District Court erroneously entered summary judgment against Plaintiffs on this claim below. Reversal of that limited ruling would provide alternative grounds upon which this Court may affirm the District Court's judgment vacating and remanding the Final Rule. See Adamson v. Port of Bellingham, 907 F.3d 1122, 1125 (9th Cir. 2018), citing Jennings v. Stephens, 135 S. Ct. 793, 798 (2015).

The best available science shows that flaws in the Conservation Strategy's protocol for calculating allowable annual "discretionary mortality" (human-caused kills by trophy hunters and state managers) will allow for

unsustainable mortality levels that will threaten the survival of the GYE grizzly bear population. Indeed, by the Service's own admission in the Final Rule, these flaws have a significant chance of causing a catastrophic population decline that will be undetectable using current monitoring techniques. Yet the Service proceeded with delisting despite its knowledge of this vital flaw, trusting– without evidence, and contrary to this Court's precedent - that future study and "adaptive management" would yield a fix before disaster strikes. The Service's decision to delist was thus arbitrary, capricious, and contrary to the ESA.

A. Human-Caused Mortality Under the Conservation Strategy Threatens the Survival of the GYE Population

The Conservation Strategy sets annual mortality thresholds at different points for three different cohorts of the GYE grizzly population — independent females, independent males, and dependent young. E.R. 112, 259. This differential approach was chosen because the death of a female bear has a more significant impact on the population as a whole than the death of a male bear, due to the species' reproductive biology. E.R. 259. Under the Conservation Strategy, a significantly higher percentage of the GYE population of adult male bears may accordingly die in any given year than adult female bears. Id. The Conservation Strategy allocates "discretionary mortality" quotas – for recreational hunting and management kills – in

accordance with the total allowable mortality limit, such that they are also separated by demographic cohort. Id. These mortality allowances directly influence state management actions: for example, prior to the District Court's order vacating the delisting rule, Wyoming had set fall hunting quotas of one female and ten male bears within the DMA and for 12 bears of any sex outside the DMA for fall 2018. 40 Wyo. Admin. Rules Ch. 68(6).

But the Conservation Strategy's accurate recognition of the need for greater protection for breeding females intersects with other parts of the Conservation Strategy to generate a dangerous and potentially population-threatening flaw. The annual population estimate using the Chao2 method is based entirely on observations of females with cubs-of-the-year, extrapolating from that count the estimated total population. 6 JSER 1368-69. Because it does not actually count male bears, instead assuming a fixed 1:1 male-to-female ratio, this methodology falters when differential levels of mortality between males and females are introduced into the ecosystem – which the Strategy expressly directs by setting different mortality thresholds for male and female bears. Id.; E.R. 112, 259. The result will be a vicious cycle: substantially more male bears than female bears are allowed to die in the any given year under the Conservation Strategy's framework; annual Chao2 population estimates based entirely on observations of *female* bears do not

detect or account for those male deaths; the next year's mortality limit is then set based on that inaccurate population estimate; an unsustainably high number of male bears die as a result; and the cycle continues undetected for years.

This defect is so severe that, in models constructed by two outside experts, it presented a greater than 50% chance of the GYE population declining, undetected by population estimates, below 500 bears: the population "floor" that would trigger an emergency federal status review. 6 JSER 1305-07 (model of Dr. Lee Broberg); 6 JSER 1328-32 (model of Dr. David Mattson). The IGBST summarized the issue as raised in these and other comments:

> [G]iven allowable mortality rates for the entire GYE of up to 7.6% for independent females and 15% for independent males when the population estimate is above 600, and assuming both males and females inside Parks will continue to die at a rate of approximately 5% per year…the number of independent males outside the Parks will decline dramatically with continued harvest subsidized by independent males that emigrate from the Parks, which will also experience some declines as a consequence. In contrast, the ecosystem-wide cohort of reproductive females remains relatively intact, thus continuing to produce relatively robust estimates of total population size (based on the Chao2 technique that is derived from counts of females with cubs-of-the-year), but with no direct measure of changes in the number of independent males. As the decline in the subpopulation of independent males occurs over a number of years, at no point are population or mortality limits surpassed, thus not triggering a review that would lead to more conservative management, entirely as an artifact of the proposed monitoring system. This is a major, unacknowledged deficiency of the proposed post-delisting monitoring and management

> and constitutes a methodological threat to the Yellowstone grizzly bear population.

6 JSER 1333-34.

The Service acknowledged this flaw in the Final Rule, admitting the likelihood of the Strategy's mortality limits being "unsustainable" and "the potential to overshoot the population objective" in a way that is not detectable due to "a lag time" in population monitoring. E.R. 172; see also 6 JSER 1336 (Interagency Grizzly Bear Study Team lead biologist: "There is indeed a lag time and the potential to exceed the threshold is real" and the "50% chance that mortality limits are unsustainable… is correct if mortality thresholds are reached every year."); 6 JSER 1338 ("[I]t is worth considering the broader issue of the monitoring system based on Chao2 possibly not detecting declines in the male subpopulation, outside and inside the Parks"). The knowledge that the Conservation Strategy, if implemented *exactly as written*, would generate a 50% chance of unsustainable levels of mortality causing the population to dip below emergency status review levels should have – but did not – cause the Service to halt the delisting process in order to address the problem using the best available science.

B. The Service Impermissibly Relied on Future "Adaptive Management" to Address this Threat

The Service's response to the acknowledged and serious threat of unsustainable levels of mortality was scientifically and legally inadequate. The Final Rule waves away the concern solely with the assurance that the problem is under further study and could, in any case, be accounted for through future non-specific "adaptive management" actions:

> Whereas IGBST is currently investigating the power of the Chao2 technique to assess how soon we can detect a change in population trend…and how far the population may already be below the objective of 674 when this is detected, the premise for this adaptive management approach is well established in the literature.

E.R. 172; see also 6 JSER 1336 ("IGBST is currently investigating the power to detect when a population threshold…has been reached and by the time it is detected, the degree to which population thresholds may be exceeded in terms of time and population size.").

But this Court has once before rejected an invocation of the magic words "adaptive management" to justify delisting GYE grizzlies in the face of serious, population-threatening, uncertainty. In Greater Yellowstone Coalition, this Court rebuked the Service for failing to "rationally explain why the uncertainty regarding the impact of whitebark pine loss on the grizzly counsels in favor of delisting now, rather than, for example, more study." 665 F.3d at 1028. Rejecting the "Service rel[ying] heavily on 'adaptive management' to justify its decision to delist the grizzly despite the scientific

uncertainty" through further, post-delisting IGBST study of the threat, the Court held that "the ESA's policy of institutionalized caution" instead demanded vacatur. Id., at 1028-30 (citations omitted).

As was the case in Greater Yellowstone Coalition, the Service's vague promise of future study – while GYE grizzly bears remain delisted, subject to trophy hunts and other sources of excessive mortality – is not a satisfactory response to a present population-level threat. The Service knowingly gambled with the future of GYE grizzly bears by delisting them into a management regime that runs a greater than 50% chance of causing catastrophic population decline. But this Court has no obligation to "defer[] to a coin flip." Id., at 1028. As an alternative ground for affirming the District Court's vacatur of the delisting rule, this Court should find that the Service failed to "articulate[] a rational connection between the facts found and the choices made," Nw. Ecosystem All., 475 F.3d at 1145, and violated its obligation under the ESA to consider the "adequacy of existing regulatory mechanisms" in light of the best available science. 16 U.S.C. 1533 § (a)(1)(D); 50 C.F.R. § 424.11(d)(2).

C. The District Court Misapplied Ninth Circuit Precedent to Rule Against Appellees on this Claim

The District Court's treatment of the claim related to human-caused mortality was conclusory and incorrect. In contrast to its careful consideration of the record evidence regarding recalibration, the District Court summarily

waved away *all* other claims alleging the inadequacy of existing regulatory mechanisms. It used an extraordinarily broad brush to do so: "Many of the Plaintiffs' arguments are foreclosed by the Ninth Circuit's opinion in [Greater Yellowstone Coal.], and the Court cannot – as the Plaintiffs request – second guess the states' willingness and ability to manage a delisted grizzly bear population." E.R. 32-33.

In so holding, the District Court conflated Humane Society Appellees' multiple claims regarding the inadequacy of existing regulatory mechanisms, some of which did question the States' commitment to the Conservation Strategy and capacity to effectively manage bears post-delisting. But this claim has nothing to do with the States' "willingness and ability" to manage grizzly bears. Id. Unlike the regulatory mechanisms issue addressed in Greater Yellowstone Coalition or the claim addressed in Section III below, this defect does not stem from the Service's reliance on non-binding voluntary regulatory mechanisms, or the unreliability of the States' commitment to diligently carrying out the Conservation Strategy. Rather, the threat of population decline described in subsection (II)(A) above results from the Conservation Strategy being executed *exactly as written*. Like the recalibration claim for which judgment was entered against the Service, this claim alleges that *even if* the Conservation Strategy is faithfully followed by all signatory agencies,

flaws in the content of the Strategy – clearly demonstrated by record evidence – will cause deleterious consequences for the population.

This Court's opinion in Greater Yellowstone Coalition did not address this issue, or any analogous issue. In that case, the Court was asked to consider whether the Conservation Strategy and related mechanisms, as non-binding measures lacking the force of law, met the ESA's definition of "existing regulatory mechanisms." 665 F.3d at 1030. Questions of the content of those mechanisms – their "inadequacy," as opposed to their status as "existing regulatory mechanisms" – were simply not before the Court in that case.

Because this claim is about the content of the Conservation Strategy and not its legal force, the District Court erred in granting summary judgment to Appellants in reliance on Greater Yellowstone Coalition.

III. THE DELISTING RULE MAY BE VACATED BECAUSE THE SERVICE UNLAWFULLY RELIED ON NON-BINDING AND UNENFORCEABLE MECHANISMS AS "EXISTING REGULATORY MECHANISMS"

Even setting aside the grave deficiencies in the Conservation Strategy and MOA described in Sections I and II above, and assuming *arguendo* that these documents would suffice to protect grizzly bears if implemented, the Service violated the ESA and APA by failing to consider, let alone provide a satisfactory explanation of, whether they will be reliably implemented.

State regulatory mechanisms whose implementation is in doubt cannot be relied upon to support a delisting determination, since "[a]bsent some method of enforcing compliance, protection of a species can never be assured." Oregon Nat. Res. Council v. Daley, 6 F.Supp.2d 1139, 1155 (D. Or. 1998); *see also* Ctr. for Biological Diversity v. Morgenweck, 351 F.Supp.2d 1137, 1141 (D. Colo. 2004). The plain language of the ESA mandates consideration of "existing regulatory mechanisms," not anticipated voluntary efforts. 16 U.S.C. § 1533(a)(1)(D). See Perrin v. United States, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). To "regulate" means "to govern or direct according to rule ... to bring under the control of law or constituted authority." Webster's Third New Int'l Dictionary 1913 (1966); *see also* Black's Law Dictionary, Pocket Edition 604 (3rd Ed. 2006) (defining "regulation" as "the act or process of controlling by rule or restriction; a rule or order having legal force, usually issued by an administrative agency.").

The Service itself interprets Section 1533(a)(1)(D) language as requiring a state protection to have the binding force of law before it may be considered under Section 1533(a)(1)(D). 68 Fed. Reg. 15,100, 15,115 (Mar.

28, 2003) (Service policy interpreting "regulatory mechanisms" to mean "laws, regulations, [or] ordinances").

A. The Conservation Strategy and MOA are Not "Existing Regulatory Mechanisms"

The Conservation Strategy and MOA are not "laws, regulations, [or] ordinances," 68 Fed. Reg. 15,115, yet they form the backbone of the post-delisting regime relied on in the Final Rule's analysis of the adequacy of existing regulatory mechanisms. Despite their central importance to the Service's rationale for delisting – as the Service concluded that the faithful implementation of the Conservation Strategy and MOA was essential to contain the ongoing threats posed by habitat fragmentation; oil, gas, and mineral development; poaching; excessive human-caused mortality due to "conflicts" and trophy hunting; and declining food sources – their reliability and legal status as "regulatory mechanisms" went largely unaddressed. E.R. 102-121.

Had the Service faithfully applied the ESA or its own policy interpreting "existing regulatory mechanisms," it would have concluded that the Conservation Strategy and MOA are not legally binding and could not be assessed as "existing regulatory mechanisms." Apart from these mechanisms' formal status as non-binding commitments, their content also confirms their status as substantially less than reliable. The MOA contains serious flaws that

cast doubt on its reliability as a means of implementing the Conservation Strategy's mortality limits, including:

- Lack of any penalty for breach, leaving States without an incentive to comply;
- Allowance for any State to unilaterally withdraw from the MOA on written notice, with no penalty;
- Express disclaimer of any right of action for citizens or the federal government to enforce the terms of the MOA, leaving no outside parties with the means to vindicate its terms;
- Reservation of each State's sovereign immunity, further insulating the States from recourse in the event of breach.

6 JSER 1339-46; see also 6 JSER 1353-54, 56-57 (public comments noting unenforceability of MOA). Each of these flaws remains in the final MOA signed by the States, incorporated into the Conservation Strategy, and relied upon in the Final Rule.

In fact, Wyoming expressly took the position – prior to publication of the Final Rule – that the MOA does not bind it. While defending itself from a state court challenge alleging violations of notice-and-comment requirements during the adoption of the MOA, Wyoming argued it was exempt from those administrative procedures because the MOA has no legal effect and is not a

regulation. Laybourn v. Wyo. Game and Fish Dep't, No. 186-086 (Wyo. First Judicial Dist. 2016) ("Laybourn"). Wyoming has consistently maintained that the MOA "is not independently enforceable," "does not require strict adherence to its objectives," "does not have any present-day binding effect and imposes no rights or obligations," and emphasized that as a State it is "free to terminate the agreement," "retains its discretion over future management [of grizzly bears]," and "has discretion to follow, or not follow, the statements contained in [the MOA]."6 JSER 1358-67.[2]

The legal impotence of the MOA and the Conservation Strategy was highlighted to the Service at multiple points during the rulemaking process. 6 JSER 1353-54, 56-57. Yet the Service took as an article of faith that they would be diligently followed – tautologically stating that "[t]he Service believes the Tri-State MOA will be implemented because all parties have approved it." E.R. 113. Nowhere in the record or the Final Rule does the Service address or even acknowledge the fatal defects highlighted above, any one of which suffices to render the MOA – and consequently the Strategy, which relies on the MOA to execute its mortality limits – insufficient and unreliable as a regulatory mechanism. Accordingly, "FWS's failure to

[2] Laybourn, Respondents' Brief at 14-16 (Dec. 1, 2016). This Court may take judicial notice of Wyoming's filing. *See* Reyn's Pasta Bella v. Visa USA, 442 F.3d 741, 746 n.6 (9th Cir. 2006).

coherently consider the adequacy of existing regulatory mechanisms renders its decision arbitrary and capricious." W. Watersheds Project v. FWS, 535 F.Supp.2d 1173, 1187 (D. Idaho 2007) (vacating FWS decision based on unexplained "assumptions" about adequacy of regulatory mechanisms).

B. The Service Failed to Apply Its Own Policy for Evaluating Voluntary Conservation Measures

Recognizing that the Conservation Strategy and MOA could not be reasonably construed as "existing regulatory mechanisms," the Service pivoted to a different provision of the Endangered Species Act in the Final Rule – Section 1533(b)(1)(A):

> The Service cannot dismiss a State conservation measure just because it is not legally binding. Rather, the varying levels of commitments and enforceability are taken into account as part of this analysis to ensure that the overall conclusion is reasonable...these measures are evaluated under Factor D and 1533(b)(1)(a). This includes the Tri-State MOA, which we consider under our broader statutory obligations under the Act, including 16 U.S.C. 1533(a)(1) and 16 U.S.C. 1533(b)(1)(A).

E.R. 182. Although Section 1533(b)(1)(A) permits the service to evaluate voluntary "efforts…being made by any State" in the context of a delisting determination, it does not give the Service license to avoid considering the reliability of such efforts altogether. In fact, the Service has promulgated a formal policy for evaluating voluntary efforts under Section 1533(b)(1)(A) by applying a two-part analysis assessing "the certainty that the conservation effort *will be implemented*" and "the certainty that the conservation effort *will*

be effective." Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15,100 at 15,114-15 (Mar. 28, 2003) ("PECE").

This accords with the D.C. Circuit's holding in Defenders of Wildlife v. Zinke, 849 F.3d 1077 (D.C. Cir. 2017), which the Service cites in the Final Rule for the proposition that non-binding state measures may be relied upon to support a delisting. Even so, the Zinke court did not hold that Section 1533(b)(1)(A) means that "anything goes." Rather, that court applied the Service's own two-part test and concluded that the mechanism at issue met it. Id., at 1084 (citing PECE, 68 Fed. Reg. at 15,114-15).

Here, by contrast, the Service did not even cite or attempt to apply those standards. Faced with state measures that were not "existing regulatory mechanisms," the Service brandished Section 1533(b)(1)(A) as a talisman allowing capricious reliance on questionable mechanisms. But whether assessed under the "existing regulatory mechanisms" language of Section 1533(a)(1)(D) or the voluntary "effort" language of Section 1533(b)(1)(A), the Service failed to explain why the Conservation Strategy and MOA meet the bar. *See* Desert Survivors v. U.S. Dep't of the Interior, 2018 WL 2215741, at *41 (N.D. Cal. May 15, 2018) ("[T]he Service's…analysis is arbitrary and capricious because it does not offer any basis for concluding that the

conservation efforts described…are sufficiently certain to be effective."); *see also* Alaska v. Lubchenco, 825 F. Supp.2d at 219 (D.D.C. 2011) ("…it is not enough for the State to identify conservation efforts that *may* be beneficial to a species' preservation; those efforts must actually be in place and have achieved some measure of success in order to count under the Service's policy.") (emphasis in original).

C. This Court's Opinion in Greater Yellowstone Coalition Does Not Foreclose This Claim

Over a partial dissent, this Court rejected a related claim in its 2011 Greater Yellowstone Coalition opinion. But that opinion addressed a different set of facts and does not stand for the proposition that "existing regulatory mechanisms" need not carry the force of law. In fact, the majority opinion in Greater Yellowstone Coalition expressly did not reach this question at all:

> District courts have held that voluntary, unenforceable measures in conservation plans are not 'regulatory mechanisms'…we need not decide whether the Strategy itself, as a whole, constitutes a 'regulatory mechanism.'…For purposes of the Factor D determination, however, we need not, and do not, consider those measures, some or all of which may not be binding, because we hold that the clearly binding [federal] regulatory mechanisms…suffice.

665 F.3d at 1030-32.

Only the partial dissent squarely addressed the issue, finding that,"[C]ompliance with the Strategy is purely voluntary...There is not a single federal or state law or regulation that provides a means for enforcing the

Strategy's mortality standards…The Service's reliance on voluntary action is contrary to law." Id., 665 F.3d at 1033-34 (Thomas, J., concurring in part and dissenting in part). The majority opinion avoided the question by holding that, regardless of the adequacy of the state-level mechanisms at issue, binding federal regulations effective on National Park Service and U.S. Forest Service land sufficed on their own to protect the population after delisting. Id., 665 F.3d at 1031.

That is no longer the case. Regardless of how much geographic *area* the federal agencies control within the DMA, the States possess complete regulatory authority over mortality under the terms of the Conservation Strategy and MOA. The Service recognizes that "[p]ost delisting, mortality management will be the responsibility of State fish and wildlife agencies. In general, the USFS and NPS will be responsible for habitat management to reduce the risk of human-caused mortality to grizzly bears" under the terms of the Conservation Strategy and MOA. E.R. 97. This includes exclusive authority over trophy hunting seasons (the immediate opening of which was not contemplated during the prior round of delisting litigation), which amplify the prospect of reaching or exceeding mortality limits. 6 JSER 1293, 95. Because States control discretionary mortality, deciding how many, in what

manner, and where bears are killed (even including federal land), federal commitment to the Strategy alone cannot satisfy the ESA.

Federal land managers' commitment to the Conservation Strategy may suffice to ensure that *some* but not *all* of its provisions are implemented. The quantity of land these agencies control – the basis of the Ninth Circuit's holding, 665 F.3d. at 1031 – is significant when considering *habitat protection*, but irrelevant when considering those provisions of the Conservation Strategy committed entirely to the States. The States – and the States alone – are empowered under the Conservation Strategy to establish annual allowable mortality limits, conduct lethal management removals, and open trophy hunting seasons. E.R. 266-67. Federal land management agencies have no authority under the Conservation Strategy to affect these decisions. Should a State decide to exercise its express right to withdraw, consequence-free, from the MOA and begin harvesting and lethally removing bears at a substantially higher rate than contemplated in the Conservation Strategy, the habitat protections provided by federal agencies would offer no protection. Even a full and legally binding federal commitment to the Conservation Strategy cannot compensate for the absence of a binding commitment by the States, because state and federal managers bear different responsibilities that are not interchangeable.

States' control over mortality under the Conservation Strategy affects even federal lands, for two reasons. First, mortality outside the boundaries of even the most well-regulated federal lands (the National Parks, where hunting and lethal removal for livestock conflict is prohibited) will affect population dynamics within those boundaries due to "source-sink" dynamics. 6 JSER 1330.

Second, and more importantly, the States are responsible for mortality management even on most federal lands within the DMA. The Forest Service currently defers to the States regarding hunting in National Forests; in fact, most of the hunting zones where Wyoming hunters would have taken bears beginning in September 2018 lie within National Forests. 36 C.F.R. § 261.8 (prohibiting hunting on national forest land only to the extent that it violates State law). And federal agencies do not receive any share of discretionary mortality under the Strategy; rather, the States collect the share of annual discretionary mortality that corresponds to the federal lands that lie within their borders. 6 JSER 1343-44. For example, although hunting is prohibited in Yellowstone National Park, it receives no share of annual discretionary mortality under the MOA. Instead, Wyoming receives the share of discretionary mortality corresponding to the federal land area that lies within

the state and has already indicated its intent to allocate that mortality to hunters. Id.; 40 Wyo. Admin. Rules Ch. 68(6).

Federal commitment to the Conservation Strategy is one important piece of post-delisting management, but it is not the whole puzzle. Legally binding protections of grizzly bear habitat, however robust, are meaningless when the lives of the bears themselves are subject to the authority of entities that have not made a binding commitment. The Service erred twice: first, by treating the States' mere signatures on a non-binding agreement as an "existing regulatory mechanism," and second, by failing to apply its own policy for evaluating voluntary conservation efforts to this manifestly voluntary scheme. The Service's failure to ensure that there are binding state regulatory mechanisms in place that will actually be implemented to protect the GYE grizzly bear from approaching the brink of extinction constitutes grounds on which this Court can affirm the vacatur of the delisting rule.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's judgment vacating and remanding the Final Rule.

Respectfully submitted this 5th day of August, 2019.

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STATEMENT OF RELATED CASES

The undersigned is aware of no related cases within the meaning of Ninth Circuit Rule 28-2.6.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I hereby certify that on this 5th day of August, 2019, I electronically filed the foregoing Brief and attached documents with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I certify that I served on this date the foregoing brief and attached documents via U.S. Certified Mail and electronic mail to the *pro se* case participant below, who is not registered in the appellate CM/ECF system:

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