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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

UNITED STATES OF AMERICA, et al.,
Defendants/Appellants,

and

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

Appeals from the United States District Court for the District of Montana
Nos. 9:17-cv-00089, 9:17-cv-00117, 9:17-cv-00118, 9:17-cv-00119,
9:17-cv-00123, 9:18-cv-00016 (Hon. Dana C. Christensen)

OPENING BRIEF FOR APPELLANT STATE OF IDAHO

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GLOSSARY

Add. ..... Federal Appellants' Statutory and Regulatory Addendum

APA ..... Administrative Procedure Act

DPS .....Distinct Population Segment

FED-ER ..... Federal Appellants' Excerpts of Record

ESA ..... Endangered Species Act

FWS ..... U.S. Fish and Wildlife Service

GYE ..... Greater Yellowstone Ecosystem

ID-ER..... Idaho's Excerpts of Record

NCDE..... Northern Continental Divide Ecosystem

NPS..... National Park Service

INTRODUCTION

Recovering the Greater Yellowstone Ecosystem (GYE) grizzly bear population is no small accomplishment. This success results from a decades-long interagency, multi-state conservation and public education effort. The U.S. Fish and Wildlife Service (FWS) certainly could not have achieved this success on its own, and it is not one Idaho takes for granted given its considerable investment of resources in the enterprise. This Court recognized the impressive nature of that cooperative effort in its review of the prior 2007 delisting rule for the GYE grizzly bear Distinct Population Segment (DPS).

The question before this Court is whether the 2017 delisting rule for the GYE grizzly bear DPS should be reinstated. Not only is reinstatement proper as a matter of Endangered Species Act (ESA) procedure and substance, it is important to achieving the ESA's purpose through promotion of cooperative recovery efforts. When such efforts are successful, as here, species must be returned to state management, lest delisting become a Sisyphean[1] task.

There is little debate that the 2017 delisting rule addressed the single-issue remand resulting from this Court's review of the 2007 delisting rule—the

[1] *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.,* 123 F.3d 1142, 1168 (9th Cir. 1997) (Trott, C.J., concurring and dissenting), *quoting* Homer, The Odyssey (citation omitted).

need to state a rational basis for determining whitebark pine declines did not pose a threat to the GYE grizzly bear DPS warranting continued listing. This Court's review of the 2007 delisting rule recognized that the demographic and habitat-based recovery criteria established for the GYE grizzly bear DPS were being met. Since the Court's prior review, this DPS has remained stable and secure, and continues to approach carrying capacity.

The Court's review of the 2007 delisting rule recognized the adequacy of existing regulatory mechanisms for long-term protection of a sustainable GYE grizzly bear DPS. Notably, state and federal regulatory mechanisms have further strengthened since 2007 through revisions to the Conservation Strategy for post-delisting management and other state and federal agency actions. The district court, however, rejected FWS' reasonable conclusion in the 2017 delisting rule that "existing regulatory mechanisms" were adequate. The district court's decision distorts the meaning of this term, as well as FWS' obligation to use "best available science," and instead requires speculation about post-delisting actions in a manner counter to case law and unsupported by the record as a whole.

In reviewing the 2007 delisting rule, this Court, as well as the district court below, identified no qualms with the legal or functional effect of delisting a newly designated GYE grizzly bear DPS on grizzly bear remaining listed in

the lower-48 states. Indeed, the Court's review of the 2007 rule discussed the delisting of the GYE grizzly bear DPS as a matter of course, consistent with the recovery and delisting framework for grizzly bear populations in the lower-48 states, which FWS has had in place for decades following other litigation.

In contrast, the district court erred in applying a readily distinguishable holding of the D.C. Circuit Court of Appeals, *Humane Society v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017). Issued shortly after publication of the 2017 GYE grizzly bear DPS delisting rule, this opinion did not warrant the rule's vacatur and remand for a complete reexamination of the legal and functional relationship between the GYE grizzly bear DPS being delisted and the grizzly bear listing retaining ESA protection in the rest of the lower-48 states. The district court's remand directs FWS to make additional findings as to what is obvious from the long-standing recovery framework and beyond what the ESA requires.

The Court should reverse the district court's decision, such that the 2017 delisting rule is reinstated. A second relisting of the recovered population and remand to address new directions ordered by the district court are counter to the ESA. Idaho and others have invested considerable resources to undeniably achieve recovery of the GYE grizzly bear DPS; we should not be left to ponder whether delisting is an ever-shifting and unattainable goal.

STATEMENT OF JURISDICTION

1. This Court has jurisdiction under 28 U.S.C. § 1291. The district court's judgment was final, granting plaintiffs' summary judgment motions and vacating the final administrative rule under review. FED-ER[2] 1, 48-49.

2. The district court entered judgment October 23, 2018. FED-ER 1. Idaho filed a notice of appeal December 20, 2018. FED-ER 62. The appeal is timely under Fed. R. App. P. 4(a)(1)(B).

3. Appellant State of Idaho has standing to seek review and reversal of the district court's judgment in its entirety, such that the final rule delisting the GYE grizzly bear DPS would be reinstated.

FWS did not challenge all of the district court's rulings as to vacatur and remand of the final rule. Where an agency defendant does not appeal, the test is whether the judgment adversely affects intervenor's interests. *Organized Village of Kake v. U.S. Dept. of Ag.,* 795 F.3d 956, 963 (9th Cir. *en banc* 2015) (citations omitted), *cert. denied* 136 S.Ct. 1509 (2016) (State of Alaska's appealing as intervenor-defendant where federal agency did not appeal district court decision in APA challenge of the 2016 Roadless Rule).

[2]This brief refers to Federal Appellants' Excerpts of Record with the prefix "FED-ER" and Idaho's Excerpts (filed herewith) with the prefix "ID-ER."

Idaho has demonstrated "injury in fact," causation, and redressability. The district court judgment directly and adversely affects Idaho's ability to manage the recovered grizzly bear population within the GYE in Idaho. Idaho has invested considerable state resources for decades to achieve GYE grizzly bear population recovery. Idaho also invested litigation resources to obtain recognition from this Court as to the adequacy of regulatory mechanisms under the prior 2007 delisting rule, and Idaho has continued to strengthen state regulatory mechanisms and other conservation measures since then.

By returning heightened ESA protections to a recovered population, the district court judgment adversely affects Idaho's ability to manage the GYE grizzly bear DPS in general and to address public safety conflicts and property loss involving bears. *See* 50 C.F.R. 17.40(b). This injury is redressable through reversal of the district court's judgment and reinstatement of the delisting rule.

STATEMENT OF THE ISSUES

Idaho states two issues in addition to those stated by Federal Appellants:

1. Whether the district court erred by holding the ESA requires FWS to make additional findings "as to the legal and functional effect" of delisting the newly designated GYE grizzly bear DPS on remaining members of the lower-48 grizzly bear listing.

2. Whether the district court erred in finding existing regulatory mechanisms inadequate because FWS did not require a commitment to a recalibration mechanism if agencies switched to a different population estimator in the future.

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are set forth in the addendum following Federal Appellants' opening brief. *Dkt. 45* at 48.

STATEMENT OF THE CASE

Idaho adopts and incorporates FWS' statement of the case.

SUMMARY OF ARGUMENT

The final judgment of the district court in favor of Plaintiffs should be reversed in its entirety, such that the final rule designating and delisting the GYE grizzly bear DPS should be reinstated.

Idaho adopts and incorporates by reference Federal Appellants' arguments as to the following district court errors: (1) holding that FWS must conduct a "comprehensive review of the entire listed species," which improperly imposes procedures not required by the ESA; and (2) rejecting FWS' conclusion that GYE grizzly bears are not threatened by genetic diversity, thereby impermissibly substituting the court's scientific judgment and substituting the court's policy preference for that of FWS.

FWS did not appeal the two remaining aspects of the district court's rationale for vacatur and remand of the final delisting rule. Nevertheless, these erroneous rulings also warrant this Court's review and reversal.

1. The district court erred in rejecting FWS' explanation confirming the continued legal force of the extant lower-48 listing for grizzly bears outside the GYE grizzly bear DPS. The agency's explanation is sufficient for ESA purposes. The D.C. Circuit's concerns, stated in *Humane Society v. Zinke,* 865 F.3d 585, do not apply, especially in light of the long-recognized recovery and delisting framework for lower-48 grizzly bears, established under the 1993 Recovery Plan.

2. The district court erred in determining that FWS acted arbitrarily because it did not require a commitment to a recalibration mechanism based on speculative change in the population estimator, despite the agreement of all federal and state agencies to not change the estimator for the foreseeable future. The district court's holding does not comport with ESA's statutory requirements and case law, which preclude FWS from considering speculative future actions in evaluating *existing* regulatory mechanisms or from forcing agencies to apply speculation or surmise in determining best available science. The district court's findings are also unsupported by the record as a whole.

STANDARD OF REVIEW

The Administrative Procedure Act, 5 U.S.C. §§ 701-706, governs judicial review of whether agency action complies with the ESA. *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). Under a "highly deferential" standard, *id.*, a reviewing court may not substitute its judgment for that of the agency, and must uphold an agency's decision as long as the agency has considered the relevant data, articulated a satisfactory explanation for its action, and made no clear error of judgment. *See Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1982). A reviewing court "must generally be at its most deferential" when reviewing scientific determinations within the agency's area of expertise. *San Luis & Delta-Mendota Water Authority*, 747 F.3d at 602 (citation omitted).

This Court reviews the district court's grant of summary judgment *de novo*. *Greater Yellowstone Coalition v. Servheen*, 665 F.3d 1015, 1023 (9th Cir. 2011). Under the APA, this Court conducts its "own review of the administrative record," without deference to the district court. *San Luis & Delta-Mendota Water Authority*, 776 F.3d 971, 991 (9th Cir. 2014).

ARGUMENT

A. The district court erred in holding that FWS must make additional findings for delisting the GYE grizzly bear DPS.

FWS argues on appeal that it should not be required to engage in a "comprehensive review of the entire listed species" to designate and delist a DPS within a listed entity. *Dkt. 45* at 31-36. Idaho adopts and incorporates by reference FWS' arguments regarding this error by the district court.

In contrast to FWS, however, Idaho also appeals the district court's holding that FWS must make additional findings "as to the legal and functional effect of delisting a newly designated population segment on the remaining members of a listed entity." FED-ER 31-32. While FWS is willing to abide by this erroneous holding,[3] Idaho is not.

FWS' willingness to accept judicial error does not render it moot or harmless to Idaho's interests and the future prospects of grizzly bear conservation in Idaho. *See Organized Village of Kake,* 795 F.3d at 963. While FWS may accept remand to address seemingly minor "fixes," it took until 2017

[3]FWS's opening brief stated the agency's 2017 regulatory review did not resolve the legal question of whether the rest of the lower-48 listing for grizzly bear continues to qualify as a "species" under the ESA when a DPS within the listed entity is delisted. *Dkt.* 45 at 30. FWS also stated that its consideration of the legal and functional effect of delisting a newly designated population segment on the remainder of grizzly bears in the lower-48 states "is underway." *Id.* at 23.

for FWS to issue a new delisting rule after this Court's single-issue remand of the 2007 delisting rule. Idaho has spent the years between the two delisting rules expending precious resources in conflict management and monitoring a recovered population under heightened ESA constraints. Idaho justifiably challenges a second remand grounded in error.

Where the Court can reverse error, and do so consistent with the ESA's purpose of promoting cooperative recovery of species to a point where the Act's measures are "no longer necessary," it should do so. *See Greater Yellowstone Coalition,* 665 F.2d at 1032; *citing* 16 U.S.C. § 1532(3).

1. The district court erred in rejecting FWS' explanation that the extant lower-48 listing for grizzly bear continued to have legal force outside the delisted GYE grizzly bear DPS.

In vacating the 2017 GYE grizzly bear DPS delisting rule, the district court erroneously applied readily distinguishable holdings of the D.C. Circuit's opinion in *Humane Society*, 865 F.3d 585, issued shortly after 2017 GYE DPS delisting rule's publication. In *Humane Society,* FWS had created legal ambiguity by designating the Western Great Lakes wolf DPS, which spanned *two* previously listed entities (wolves in Minnesota listed as threatened, and other lower-48 wolves listed as endangered), and then announcing the remaining population was no longer a protectable species. *Humane Society*, 865 F.3d at 602.

The *Humane Society* court found that the Service had legal authority to identify a DPS within a listed entity, and assign "a different conservation status to that segment if the statutory criteria for uplisting, downlisting, or delisting are met." *Id.* at 600. However, the *Humane Society* court found that FWS did not exercise this authority properly in designating and delisting the Western Great Lakes wolf DPS. *Id.* Based on a distinguishable fact pattern, the D.C. Circuit vacated the rule delisting the Western Great Lakes wolf DPS, because it would "divest the extant listing of legal force." *Id.* at 601. The *Humane Society* court found that FWS had circumvented ESA delisting standards "by riving an existing listing into a recovered subgroup," creating a "leftover group that becomes an orphan to the law," and making "an already listed species an unlisted and unlistable non-species." *Id.* at 602-3.

In applying *Humane Society* to the 2017 GYE grizzly bear DPS delisting rule, the district court ignored key distinctions evident from the context of the listing history of lower-48 grizzly bears and the longstanding planning framework for delisting individual populations, including the GYE.

In reviewing the history leading to the 2007 delisting rule, both this Court and the district court below noted the litigation of the 1993 Recovery

Plan and a subsequent settlement[4] resulting in changes to habitat-based recovery requirements. *Greater Yellowstone Coalition,* 665 F.3d at 1020; *see also Greater Yellowstone Coalition v. Servheen,* 672 F.Supp.2d 1105, 1110 (D. Mont. 2009) (*aff'd in part, rev'd in part by the preceding cited case)*.

The 1993 Recovery Plan's Executive Summary states a single Recovery Objective, "Delisting of each of the remaining populations by population as they achieve the recovery targets." FED-ER 431. The Plan repeated similar language in detailing Requirements for Recovery, "Grizzly bear populations may be listed, recovered, and delisted separately." FED-ER 436; *see also* 82 Fed.Reg. 57,698 (Dec. 7, 2017) (FWS Regulatory Review, *Federal Appellants' Addendum 5a*).

The Plan described two requirements for delisting an individual population: (1) attainment of population demographic and habitat parameters[5] for a specified time, and (2) completion of an interagency conservation strategy for population and habitat management post-delisting. *See* FED-ER 435.

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[4] *Fund for Animals v. Babbitt,* 903 F.Supp. 96 (D.D.C.1995), *amended* 967 F.Supp 6 (D.D.C. 1997) (approving settlement agreement).

[5] The Plan's demographic- and habitat-based recovery criteria for individual population "recovery zones" continued to be refined during the 1990s and 2000s. *Greater Yellowstone Coalition*, 665 F.2d at 1020.

The GYE grizzly bear population was the first to meet these two requirements, eventually leading to the 2007 delisting rule. In litigation of the 2007 rule, there was no challenge of the separate designation or delisting of the GYE DPS in this Court or the district court below. *Greater Yellowstone Coalition,* F.Supp.2d at 1110, 1113; *Greater Yellowstone Coalition,* 665 F.3d at 1020-1. This Court accepted the process of delisting the individual GYE grizzly bear DPS as a matter of course under the Recovery Plan. *See id.*

In defending the 2017 delisting rule in the district court, FWS and defendant-intervenors addressed potential application of *Humane Society* by referring to the fact that the listed status of grizzly bears would continue in the remainder of the lower-48 states. *See* ER 26. FWS and defendant-intervenors also pointed out that the revised 1993 Recovery Plan remains in effect and that separate demographic and habitat recovery criteria developed for individual zones outside the GYE DPS continue to define recovery in those zones. The district court rejected defendants' arguments as "simplistic at best and disingenuous at worst." *Id.*

Simplicity, however, does not render explanation irrational or insufficient. And, even where a decision is of less than ideal clarity, "a court is not to substitute its judgment for that of the agency . . . if the agency's path may reasonably be discerned." *Snoqualmie Valley Preservation Alliance v. U.S.*

Army Corps of Engineers, 683 F.3d 1155, 1163 (9th Cir. 2012), *quoting F.C.C. v. Fox Television Stations, Inc.,* 556 U.S. 502, 513 (2009) (citation omitted). Given the listed status and long-standing recovery framework for the lower-48 listing of grizzly bears, a simple explanation sufficed to address the concerns of the *Humane Society* holdings.

FWS' "simplistic" answer in this case was appropriate, because the GYE grizzly bear DPS designation and delisting trigger none of the D.C. Circuit's concerns in *Humane Society*. Grizzly bear populations outside the GYE DPS in the lower-48 states retained ESA-listed status as threatened. *See* FED-ER 98, 214. The GYE DPS delisting did not divest the lower-48 listing of legal force; it did not make remaining grizzly bears in the lower-48 states an unlisted or unlistable species; and it did not make these grizzly bears orphan to the law.[6] *See* FED-ER 98, 214.

[6]The district court's opinion muddied the status of potential delisting of the Northern Continental Divide Ecosystem (NCDE) population. A draft conservation strategy for the NCDE, consistent with the 1993 Recovery Plan framework, has been pending since 2013. *See* FED-ER 24. FWS, however, has not issued a proposed delisting rule that includes the NCDE recovery zone.

Separately, this district court vacated FWS' determination that the Cabinet-Yaak grizzly bear population was not warranted for uplisting as endangered (relative to the threatened listing for all lower-48 grizzly bears). *Alliance for the Wild Rockies v. Zinke*, 265 F.Supp.3d 1161 (D. Mont. 2017). The *AWR* decision remanded the matter to FWS to make a determination specific to the Cabinet-Yaak population, which has not yet occurred. The Cabinet-Yaak and NCDE

Based upon the prior decades of legal and administrative proceedings regarding grizzly bears and other case law, the Court should reverse the district court's ruling. *Humane Society* does not present any change in the law requiring FWS to make additional findings as to the legal or functional effect that GYE DPS delisting would have on the remainder of the lower-48 listing.

B. The district court erred in finding existing regulatory mechanisms inadequate.

1. The district court erred in finding existing regulatory mechanisms inadequate in the absence of a commitment to recalibration in the event of a future change in the population estimator.

This Court determined the regulatory mechanisms included in the National Park Compendia and the National Forest Plans were sufficient to support FWS' finding in the 2007 delisting rule that existing regulatory mechanisms were adequate. *Greater Yellowstone Coalition*, 665 F.3d at 1030-1. This Court did not even need to decide whether the Conservation Strategy as a whole or other measures constituted "regulatory mechanisms" under the ESA. *Id.* at 1030-2 (reversing the district court and directing entry of summary judgment in favor of governmental appellants).

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populations remain within the listing of grizzly bears in the lower-48 states as threatened, both at the time of the 2017 delisting and as of this filing.

In reviewing the 2017 delisting rule, the district court held that FWS could not reasonably conclude that existing regulatory mechanisms were adequate to protect the GYE DPS. The district court found FWS was arbitrary and capricious for the sole reason it did not require a provision for recalibration in the event wildlife managers adopted a different population estimator post-delisting. FED-ER 34-5.

This Court need not delve into the details of the administrative record, because of the fundamental nature of the district court's error in failing to limit its review to *existing* regulatory mechanisms and in applying an incorrect standard as to best available science.

The district court's ruling listed three reasons for its conclusion that the FWS could not reasonably find regulatory mechanisms adequate:
(1) the court described FWS' commitment in the final rule to Chao2 (the current population estimator) as "equivocal"; (2) the court believed the parties should address recalibration as a general matter, "even if it is only to state a commitment to recalibration," and (3) the court believed "general good intentions of the parties do not override the ESA's mandate that decisions be made in accordance with the best available science." FED-ER 38.

As to the first reason, FWS' ultimate determination in the final rule was that continuing to use the Chao2 estimator for the foreseeable future was

consistent with "best available science." FED-ER 94; *see* FED-ER 146-7; *see also* ID-ER 60 (draft comment response by Interagency Grizzly Bear Study Team Lead Frank van Manen).

The district court's second and third reasons for its conclusion are likewise flawed. FWS may not rely on promises of future actions or speculative regulatory mechanisms as *existing* regulatory mechanisms under the "5-factor analysis" for listing decisions under § 4 of the ESA (16 U.S.C. § 1533 (a)(1)). *Defenders of Wildlife v. Kempthorne,* 535 F.Supp.2d 121, 131 (D.D.C 2008) (citation omitted); *see also Greater Yellowstone Coalition,* 672 F.Supp.2d at 1116 (D. Mont. 2009) (district court's review of the 2007 GYE grizzly bear DPS delisting rule and holding that promises of future actions do not serve as regulatory mechanisms).

Similarly, the purpose of the ESA requirement that each agency "'use the best scientific and commercial data available" is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise." *Bennett v. Spear,* 520 U.S. 154, 176 (1997), *citing* 16. U.S.C. § 1536(a)(2). The district court acknowledged *Bennett*, and even recognized that it was "likely true that the mathematical formula for recalibration cannot be determined until a new estimator is selected." FED-ER 38-9. Yet the district court persisted in erroneously holding that FWS was arbitrary by not requiring a generalized,

future-based commitment to recalibration as an existing regulatory mechanism.

The 2017 final delisting rule provided a rational explanation as to why FWS determined a provision on recalibration (in the event of a future change in population estimator) was not necessary for delisting. FED-ER 146-7. FWS considered the relevant data, articulated a satisfactory explanation for its action, and made no clear error of judgment. The Court should therefore reverse the district court and uphold FWS' determination under the APA's "highly deferential" standard without need for further consideration of the record. *See Motor Vehicle Manufacturer's Ass'n*, 463 U.S. at 43; *see also San Luis & Delta-Mendota Water Authority*, 747 F.3d at 602 ("most deferential" standard of review for scientific determinations within the agency's area of expertise).

2. The district court erroneously rejected the final rule's reasoned explanation as to resolution of a disagreement among federal and state agencies regarding a potential change in population estimator.

Should this Court consider the details of the administrative record under the *de novo* standard, the Court should find once more that FWS reasonably concluded that *existing* regulatory mechanisms for the GYE DPS are adequate and that the district court's ruling to the contrary should be reversed. *See Greater Yellowstone Coalition,* 665 F.3d at 1020, 1032.

The district court's analysis failed to view the record as a whole, seemingly blinded by flamboyant language of a small number of emails authored by FWS' then-Director Dan Ashe and then-Recovery Coordinator Chris Servheen. The emails concerned a short-lived disagreement among state and federal agencies as to how to address comments on the proposed rule and draft revisions to the Conservation Strategy regarding the potential for future change to a different population estimator at some future time post-delisting. *See* ID-ER 30.

In reaching a flawed conclusion, the district court overlooked a basic sequence of import. FWS had not identified a mechanism for recalibration as a longstanding pillar of delisting. Indeed, neither the March 11, 2016 proposed rule nor its 2007 predecessor and accompanying Conservation Strategy identified a mechanism for recalibration as a central regulatory need. *See* ID-ER 2-5 (March 11, 2016 proposed rule); *see also* ID-ER 68-71 (Appendix C from 2007 Conservation Strategy). The 2016 proposed delisting rule explained that the model-averaged Chao2 method is the best available science and a conservative approach to population estimation (*i.e.,* an estimator prone to underestimation). ID-ER 3-4.

The record reflects that the issue of recalibration emerged in comments on the 2016 proposed rule and draft conservation strategy. ID-ER 16-19 (May

10, 2016 letter from Sue Masica with the National Park Service (NPS)). As later described by NPS, the issue was not a pure question of best available science. *E.g.,* ID-ER 28-29 (July 2016 minutes reflecting Yellowstone National Park Superintendent Dan Wenk's perspective that the core of the issue of recalibration is "a public demand to know what will happen if the population estimate becomes much higher based on a new model").

The district court rejected FWS' characterization of this discussion as a healthy, robust debate. ER 40. The record, however, supports FWS' description. The interagency Yellowstone Ecosystem Subcommittee, FWS and the States offered different language proposals regarding the issue of recalibration in the event the population estimator changed in the future. *E.g.,* ID-ER 30, 35-6, 39-40. The district court quoted Dan Ashe's reference to "show stopper" in an October 28, 2016 email. FED-ER 37; *see* ID-ER 37 (Ashe email telling NPS Director Jonathan Jarvis "if your representatives vote to support Wyoming's language, they are voting to stop the delisting process"). The district court also quoted a similar October 28 email from Chris Servheen. FED-ER 37-8. The district court ignored the facts that the final revised GYE Conservation Strategy did not adopt "the Wyoming language" decried by the Service, and that discussions continued for another month before reaching resolution. *See* ID-ER 48-9.

FWS, NPS, states and other federal agency signatories to the Conservation Strategy ultimately agreed to drop the speculative recalibration language to which the states objected from Appendix C. FED-ER 147. The final Conservation Strategy added language, as proposed by FWS, to use Chao2 "for the foreseeable future." ID-ER 48-9. The final rule provides rational explanation for the final language choice, sufficient for the Court to determine FWS' conclusions as to best available science and adequacy of regulatory mechanisms were reasonable ones. FED-ER 147.

Other record materials are supportive of this explanation. As Director Ashe explained in a November 16 email, the final resolution of using Chao2 for the "foreseeable future" was "to the bear's advantage," based on the protections afforded by virtue of Chao2's being a "very conservative estimator." ID-ER 48; *see also, e.g.,* FED-ER 356 (peer reviewer comments on the proposed rule); ID-ER 52-3 (Idaho's Wildlife Bureau Chief Jeff Gould's remarks at an interagency committee meeting, reflecting the resolution ultimately reached based on best available science).

The record as a whole does not support the district court's apparent inference that discussions between FWS leadership, governors and state wildlife managers inherently involved political pressure to reduce science standards. Indeed, the record reflects the states' long-term and continued

investment and dedication to best available science in grizzly bear recovery. FED-ER 89 (scientists from each state wildlife agency participate in the Interagency Grizzly Bear Study Team established in 1973, along with scientists from FWS, U.S. Geological Survey, NPS, U.S. Forest Service, and academia); *see also* FED-ER 398, 415, 417, 419 (Study Team reports issued on an annual basis). The record also reflects the state wildlife agencies' ongoing commitment to apply the ESA's "best available science" standard in post-delisting grizzly bear management, and their emphasis on science considerations in resolving the disagreement over "recalibration." *See* FED-ER 271; ID-ER 35-6.

FWS' insistence on recalibration language to respond to comments on the draft delisting rule proved temporary because FWS met its needs rationally through other means. FED-ER 147. FWS' temporary insistence, arising during publication and comment on the proposed rule and ending before publication of the final rule, does not warrant consideration as a policy change. Even were the Court to interpret it is as such, the final rule provides sufficient rationale to uphold FWS' decision as reasonable. *Id*. An agency adopting a policy change "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the

agency *believes* it to be better . . . ." *F.C.C.,* 556 U.S. at 515 (emphasis in original).

The district court's quoting of various "concerns" in FWS emails and statements in the fall of 2016 ignored resolutions and other developments in the ensuing months leading to the final rule in June 2017. For example, the district court quoted a November 16, 2016 email from Chris Servheen questioning the deletion of a reference to "best available science" from Appendix C. FED-ER 39; *see* ID-ER 41. However, this email, stating it was sent after a "quick read" (consistent with timestamps between receipt and reply) led the district court to an erroneous conclusion that FWS had capitulated to the states. *See* FED-ER 39.

The record shows Mr. Servheen's stated concern was unfounded because the main body of the Conservation Strategy included language of broader application. The Strategy's signatories committed to use "best available science" in *any* revisions to mortality management, with related information to "be open to full public review." FED-ER 271. Thus, deletion of "best available science" language from Appendix C was inconsequential in light of the overarching commitment.

The district court referred to the "threat" presented by the parties' failure to prospectively dispose of recalibration, seemingly because the Chao2

estimator is "highly conservative" and likely to underestimate population size. FED-ER 39. As explained by Frank van Manen, leader of the Interagency Grizzly Bear Study Team in providing FWS with draft responses to comments about sustainable mortality limits: "With a highly conservative estimation technique due to documented underestimation bias of the Chao2 technique, as detailed elsewhere, management decisions will also be conservative." ID-ER 58 (Interagency Study Team lead Frank van Manen's draft comment response); *see also* FED-ER 356 (a peer reviewer's description of Chao2's "negative-bias" and corresponding fewer management allowances for discretionary mortality and harvest (hunting) than would be allowable under less-conservative estimators). It does not follow, however, that a less-conservative, more accurate population estimator (*i.e.,* one that determines *more* bears are in the population) would lead to management decisions that pose a "threat" to the delisted DPS. Such speculation is moot in any event, given the federal and state agencies' agreement to use the Chao2 estimator for the foreseeable future, best available science, and the established process for making modifications to Conservation Strategy's demographic criteria. *See* FED-ER 147; FED-ER 271.

Finally, the district court referred to a need to maintain "heightened protections" in its determination that regulatory mechanisms were inadequate.

FED-ER 39. In its prior reversal of the district court's decision on the 2007 delisting rule, this Court held that ESA's purpose is to recover species to a point where its own measures are "no longer necessary," thus contemplating that something less can be enough to maintain a recovered species." *Greater Yellowstone Coalition,* 665 F.2d at 1032, *citing* 16 U.S.C. § 1532(3).

Based on the APA standard of review that is "highly deferential" to the agency, the Court should reverse the district court and find FWS reasonably concluded regulatory mechanisms for the GYE grizzly bear DPS are adequate.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's judgment, and the final rule delisting the GYE grizzly bear DPS should be reinstated.

Respectfully submitted this 7th day of June, 2019.

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STATEMENT OF RELATED CASES

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

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CERTIFICATE OF COMPLIANCE FOR BRIEFS (FORM 8)

9th Cir. Case Number(s) Nos. 18-36030, 18-36038, 18-36042, 18-36050, 18-36077, 18-36078, 18-36079, 18-36080

I am the attorney or self-represented party.

This brief contains 5,289 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1.

Signature: s/Kathleen E. Trever **Date:** June 7, 2019

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing/attached documents with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system on June 7, 2019.

I certify that I served the foregoing brief on this date by third-party commercial carrier for delivery within 3 calendar days, and by email, to the following unregistered case participant:

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