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)

RESPONSE AND REPLY BRIEF FOR APPELLANT STATE OF IDAHO

LAWRENCE G. WASDEN
Attorney General
DARRELL G. EARLY
Chief Deputy Attorney General
Natural Resources Division
STEVEN STRACK
KATHLEEN TREVER
Deputy Attorneys General
State of Idaho
(208) 334-3715
kathleen.trever@idfg.idaho.gov

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GLOSSARY

APA ..... Administrative Procedure Act

AWR Brief……Answering Brief for Alliance for the Wild Rockies, et al.

BLM……Bureau of Land Management

Crow Brief……Answering Brief for the Crow Indian Tribe

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

HSUS Brief……Answering Brief for the Humane Society of the United States

ID-ER…….. Idaho's Excerpts of Record

ID-FER……Idaho's Further Excerpts of Record

IGBST……Interagency Grizzly Bear Study Team

NCT Brief……Answering Brief for Northern Cheyenne Tribe, et al.

NPS…….. National Park Service

USFS……U.S. Forest Service

USGS……U.S. Geological Survey

WEG Brief……Answering Brief for Wild Earth Guardians

WY-ER……Wyoming's Excerpts of Record

Defendant-Intervenor/Appellant State of Idaho (Idaho) provides this combined reply to the principal briefs of Plaintiffs/Appellees (Plaintiffs) and response to the principal brief of Cross-Appellant Robert Aland.

INTRODUCTION

The 2017 Rule delisting the grizzly bear GYE DPS has clearly addressed the single issue on which this Court upheld remand of the 2007 delisting Rule in *Greater Yellowstone v. Servheen,* 665 F.3d 1015 (9th Circ. 2011) — the potential threat from whitebark pine declines. In the intervening decade, regulatory mechanisms have only strengthened, and additional study confirms genetics are robust. The Court should reject Plaintiffs' arguments and reverse vacatur and remand of the rule and the district court's underlying holdings. The district court impermissibly substituted its judgment for that of the agency, and imposed additional analytical requirements for listing determinations not mandated by the ESA.

SUMMARY OF ARGUMENT

1. This Court has jurisdiction over Idaho's appeal because Idaho seeks reversal of an adverse judgment vacating the 2017 Final Rule that removed the GYE grizzly bear DPS from the listing of threatened and endangered species. This judgment is final as to the State, and is injurious to Idaho's sovereign and other interests. These injuries include limiting the

operation of Idaho's laws, the management of wildlife within its borders, and the proper application of the ESA as it applies in Idaho.

2. Idaho seeks reversal of all district court holdings remanding the 2017 Final Rule to FWS and determining the scope of issues that FWS must address on remand. The ESA does not require that FWS conduct a comprehensive review of the lower-48 grizzly bear listing before it can delist the GYE DPS. Nor does the ESA require, as a prerequisite to delisting the isolated-but-recovered GYE DPS, that FWS analyze whether delisting threatens remaining grizzly bears in the lower-48. The Court should decline to adopt the reasoning of the D.C. Circuit in *Humane Soc'y v. Zinke,* 865 F.3d 585 (D.C. Cir. 2017), because it is at odds with this Court's holdings restricting courts from imposing procedural requirements not explicitly stated in the pertinent statute.

3. The best available science supports FWS' findings that the grizzly bear GYE DPS is not threatened by genetic factors. FWS' review of DPS genetic health in the 2017 rule supports FWS' findings that translocation can now be a backstop instead of required as it was in the 2007 rule.

4. In evaluating the 2007 version of the delisting rule, this Court found that FWS rationally supported its conclusion that adequate regulatory mechanisms are in place to maintain a recovered grizzly bear GYE DPS

without the ESA's staunch protections. That continues to be the case with the 2017 rule. Like its 2007 predecessor, the 2016 Conservation Strategy continues to rely on the use of the conservative Chao2 population estimator in establishing limits for managing mortality. In response to relatively recent FWS concerns about the future and speculative potential to switch from Chao2 to a "better" estimator, the 2016 Strategy provides that no change in estimator will occur unless there is public comment and approval by the interagency Yellowstone Grizzly Coordinating Committee (federal, state, tribal, and local representatives).

The district court erred in holding that regulatory mechanisms are inadequate because the Conservation Strategy did not include a general "commitment" to recalibrating an as yet-undetermined population estimator to Chao2, specifically tied to the 2002-2014 period. In addition to relying on incorrect information from an FWS staff email about the Conservation Strategy's commitment to best available science, the holding fails to apply APA deference to the agency. The holding goes well beyond the ESA requirements for existing regulatory mechanisms for a delisted population. The holding itself is inconsistent with best available science because it would constrain best-available science of the future to best-available science of today.

This holding improperly requires protections for a de-listed population to be commensurate with, and arguably greater than, those provided by the ESA.

5. Plaintiffs' numerous alternative arguments are meritless. Idaho generally incorporates by reference FWS' reply to those arguments. Cross-Appellant Aland's arguments are likewise meritless. Idaho generally incorporates by reference FWS' arguments in response.

ARGUMENT

I. The Court has appellate jurisdiction.

A. Idaho has standing to appeal.

Plaintiff-Appellees ("Plaintiffs") devote a significant portion of their Answering Briefs challenging the State of Idaho's standing, along with that of all other appellants. *See, e.g., AWR Brief* at 20-24; *Crow Tribe Brief* at 8-12; *WEG Brief* at 24-5; *HSUS Brief* at 1-2. The Jurisdictional Statement in Idaho's Opening Brief was succinct because the factual and legal basis supporting its interests and injury are readily apparent from the record. However, because Plaintiffs have raised the issue, Idaho will further detail why it has standing to appeal.

To determine whether an intervenor may appeal a decision not appealed by one of the parties in the lower court, "the test is whether the intervenor's interests have been adversely affected by the judgment." *Didrickson v. United*

States, 982 F.2d 1332, 1338 (9th Cir. 1992) (citations omitted). "Generally, an intervenor may appeal from any order adversely affecting the interests that served as the basis for intervention, provided that the requirements of Article III are satisfied." *Id.* (citation omitted). For appellate standing, an intervenor must suffer an injury-in-fact, traceable to the district court's judgment, that can be redressed by the appellate court. *Organized Village of Kake v. Dep't of Agriculture*, 795 F.3d 956, 963 (9th Cir. 2015) (*en banc*), *cert. denied* 136 S. Ct. 1509 (2016) (intervenors may defend the federal government's alleged APA violations when federal defendants decide not to appeal, provided they meet Article III standing.[1]

1. Idaho has suffered injury-in-fact traceable to the district court's judgment.

Idaho appeals an adverse judgment in a matter in which it was granted intervention as a matter of right in the district court. ID-FER-3 (district court finding "Idaho has significant protectable interests that may be impaired as a result of this litigation"). The U.S. Supreme Court has long recognized that

[1] Because Plaintiffs have challenged Idaho's standing to appeal as a Defendant-Intervenor, Idaho has included in its Further Excerpts of Record (ID-FER) the district court's Order granting Idaho intervention as a matter of right. ID-FER-1. Idaho's Further Excerpts also include its brief in support of its motion under Fed. R. Civ. P. 24(a) and 24(b), as referenced in the district court's order, to aid if necessary in confirming Idaho's standing to appeal. ID-FER-4. Cir. R. 30-1.5.

states have special status in the standing context. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) ("Well before the creation of the modern administrative state, we recognized that States are not normal litigants for the purposes of invoking federal jurisdiction").

At the commencement of this action in district court, the grizzly bear GYE DPS was excluded from the federal regulation listing endangered and threatened wildlife for protection under the ESA. *See* FED-ER 213-4 (2017 Final Rule, setting forth 50 C.F.R. § 17.11(h) as then-amended). Because of such exclusion, Idaho's state wildlife management agency could act to maintain a recovered grizzly bear population in the GYE DPS outside of Yellowstone National Park, as appropriate for its state interests and those of its citizens under state law. It could act to address the conflicts that come with grizzly bear population growth and expansion without federal authorization for every interaction it had with a grizzly bear to address conflict, whether that involved capture, relocation, hazing, or dispatch. Idaho was managing the population outside of Yellowstone National Park under state laws, rules, proclamations and agreements it had entered into with other state and federal agencies. *See*, e.g., FED-ER 112-5 (Final Rule summarizing interagency 2016 Conservation Strategy for Grizzly Bear in the GYE; Tri-State Memorandum of Agreement, and the Idaho Grizzly Bear Management Plan).

The district court judgment setting aside the delisting rule essentially divests Idaho of its sovereign authority to manage grizzly bears in the GYE DPS for the indefinite future. Such divestment injures Idaho by inhibiting the state's ability to manage and regulate its wildlife. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) ("States have important interests in regulating wildlife and natural resources within their borders"). It also inhibits Idaho's ability to enforce its legal codes. *See Maine v. Taylor*, 477 U.S. 131, 137 (1986) ("a State clearly has a legitimate interest in the continued enforceability of its own statutes").

The district court's order setting aside the delisting rule effectively preempts the statutes, rules, and management plans that Idaho has in place to assume responsibility for grizzly bear management upon delisting. 16 U.S.C. § 1538(a)(1)(B) (ESA prohibitions against take of listed species without federal authorization); *see also* 16 U.S.C. § 1532(19) (defining "take"); 50 C.F.R. § 17.40(b) (restricted allowance for grizzly bear take). *See generally* FED-ER 224-8 (2016 Conservation Strategy); *see also, e.g.*, Idaho Code §§ 36-202, 36-1101, 36-1401 and 36-1404 (designating protection of grizzly bear as "trophy big game animals," and as such subject to greater penalties and reimbursable damages for unlawful take); Idaho Code §§ 36-1107 and 36-1109 (authorizing control of grizzly bears molesting or attacking livestock and compensation for

property damage from grizzly bears). Federal interference with these sovereign interest is sufficient to confer standing. *See Maine v. Norton*, 257 F. Supp. 2d 357, 374 (D. Me. 2003) (ESA "listing injures the State by interfering with its sovereign interests in managing its own natural resources and enacting and enforcing its own legal code").

Moreover, if the extensive injuries to Idaho's sovereign interests were deemed insufficient, Idaho law also sets fees for hunting licenses, grizzly bear tags, and controlled hunt applications (referred to by AWR as a lottery, *AWR Brief* at 26).[2] Idaho has both sovereign and pecuniary interests when its ability to conduct state-regulated hunting is constrained. *See, e*.g., JSER 1085 (district court grant of temporary restraining to prevent Idaho from preceding with a fall season open to a single hunter).

Finally, the district court's judgment injures Idaho's interest in the successful implementation of the ESA. As the Court recognized in *Greater Yellowstone Coalition*, "[a] major goal of the ESA's protections is recovery of threatened and endangered species such that they can be removed from the list." *Greater Yellowstone Coalition*, 665 F.3d at 1024. "[T]he ESA expressly aims for species recovery to the point where its own measures are 'no longer

[2] Idaho Code § 36-416 sets the price of a resident grizzly bear tag at $198.00 and a nonresident grizzly bear tag at $2,100, with the fee to apply for a tag drawing at $15.00 for residents and $40.00 for nonresidents.

necessary,' . . . thus contemplating that something less can be enough to maintain a recovered species." *Id.* at at 1032, *citing* 16 U.S.C. § 1532(3). The district court's judgment prevents proper application of the ESA to Idaho's state interests in the delisting and post-delisting management of a recovered DPS.

Idaho has chosen to actively participate in management and recovery of grizzly bears listed under the ESA for decades to attain the goal of delisting. Recovery of grizzly bears has involved Idaho and its citizens taking additional steps in sanitation and livestock husbandry, along with taking more precautions and giving up some freedoms in outdoor work and recreation. *See* FED-ER 110, 254-5 (describing actions to reduce conflicts on private and public lands, change in sanitation and livestock carcass and feed, and public land management changes in the form of seasonal closures and reduced motorized access).

However, conflicts will continue, and indeed correlate to the success of grizzly bear population growth and expansion. *Fed. Reply Brief* at 35; *see* FED-ER 309 (Conservation Strategy description of bear conflicts). The increased post-delisting flexibility to address conflict situations under state law, along with the ability to provide a limited public hunting opportunity when appropriate, is important to show Idaho's citizenry that their collective effort to

support grizzly bear recovery is worth it. The district court decision impairs Idaho's grizzly bear conservation efforts by making delisting an ever-shifting goal.

2. Idaho's injuries are redressable by this Court through reversal of the district court's judgment.

Plaintiffs contend that FWS' acceptance of remand and decision to not appeal all of the district court's holdings deprive the Court of jurisdiction as to Idaho's appeal, because the judgment is not final as to Idaho. *See WEG Brief* at 24-5. However, the order is final as to Idaho.

Remand orders are "ordinarily final only for purposes of a [federal] government appeal." *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1175 (9th Circ. 2011) (citation omitted). However, this Court has found a remand order is final where:

> (1) the district court conclusively resolves a separable legal issue, (2) the remand order forces the agency to apply a potentially erroneous rule which may result in a wasted proceeding, and (3) review would, as a practical matter, be foreclosed if an immediate appeal were unavailable.

Id.

This Court has applied a "practical construction" to the finality requirement, and the above three-part "test" identifies considerations rather than strict prerequisites. *Id.* (citation omitted).

The district court's opinion supporting its judgment made two specific holdings describing additional commitments that Idaho and its sister states must make for their regulatory mechanisms and other actions to be considered sufficient for FWS delisting.

Both holdings have the practical effect of requiring an amendment to the 2016 Conservation Strategy (signed by the three states and four federal agencies) or some other equivalent action by its signatory agencies. One holding requires a nebulous "general commitment to recalibration" of population-based mortality rates in the event there is a future change in the current population estimator. FED-ER 38. The other holding takes the form of a prescription for translocation or natural connectivity. FED-ER 40.

The district court conclusively resolved these separable legal issues concerning Idaho. It vacated and remanded the rule to FWS for further proceedings. FED-ER 48. If the Court were to reverse the district court, then FWS would not have to proceed with conducting analyses concerning grizzly bears in the lower-48, revisiting analyses regarding translocation and recalibration, or revising its delisting rule. The federal and state signatories to the Conservation Strategy would not have to consider revisions, and the governing Fish and Game (Wildlife) Commissions of Idaho and its sister states would not have to revisit the Tri-State Memorandum of Agreement Regarding

the Management and Allocation of Discretionary Mortality of Grizzly Bears in the GYE.

Consideration of best available science would not be affected by the district court's erroneous holdings. Because Idaho, its sister states, and other agencies have to take their respective actions through their own administrative processes *before* FWS could issue a final rule, they, too would have to apply potentially erroneous results in considering revisions to the Conservation Strategy and individual state rules, regulations, proclamations, and other administrative actions. This time sequence may result in not only wasted administrative proceedings for FWS but for Idaho as well. And because of the sequence of Idaho's having to adopt administrative changes before an FWS delisting determination, review is foreclosed as a practical matter for Idaho absent immediate appeal.

The relief Idaho seeks is for the GYE grizzly bear DPS to be delisted based on the final rule now before the Court: that is, *without* the obligation to recalibrate population-based mortality rates specifically tied to 2002-2014 if an as-yet-undetermined population estimator is adopted in the future; *without* a fixed obligation to translocate grizzly bears by a date certain; and *without* additional analytical requirements for FWS to conduct related to the entirety of the lower-48 listing before delisting of the GYE DPS can occur.

II. The ESA does not require FWS to conduct additional analyses of other grizzly bears in the lower-48 before designating and delisting the isolated-but-recovered GYE DPS.

Plaintiffs assert the district court's holding "reflected an appropriate application of the ESA's statutory requirements…." *NCT Brief* at 22. However, neither the ESA nor implementing regulations explicitly impose requirements to perform a comprehensive analysis of a different listed entity, or to analyze the effect of a listing determination outside of the entity to which that determination applies (*i.e.,* a listing determination for a DPS only considers threats to that DPS). As such, this Court has acknowledged that federal courts are not free to impose on an agency their "own notion of which procedures are 'best' ". . . ." *Lands Council v. McNair,* 537 F.3d 981, 993 (9th Cir. 2008), *overruled on other grounds by Winter v. Nat. Res. Def. Council, Inc.* 555 U.S. 7 (2008) (citations omitted). Federal courts may not impose "procedural requirements [not] explicitly enumerated in the pertinent statutes." *Conservation Congress v. U.S. Forest Service,* 720 F.3d 1048, 1056 (9th Cir. 2013) (citation omitted).

The Court should therefore decline to adopt the reasoning of *Humane Soc'y v. Zinke,* 865 F.3d at 601, in which the D.C. Circuit imposed additional requirements upon FWS decision-making when it designates a DPS comprising a portion of a previously listed entity and contemporaneously

delists the DPS. Although the D.C. Circuit stated the ESA provides "explicit" delisting standards that do not allow FWS to "riv[e] an existing listing into a recovered sub-group and a leftover group that becomes an orphan unto the law," *NCT Brief* at 22, *quoting Humane Soc'y*, 865 F.3d at 603, an examination of the statute in question shows this is not the case.

As a litigation choice, FWS appealed only one aspect of the additional procedural requirements imposed by the district court in adopting the reasoning of *Humane Society*. In doing so, FWS rightly pointed out that this Court's precedent does not allow the district court's imposition of a procedural requirement, not explicit in the ESA, to perform "a comprehensive analysis" of the listed entity that includes a DPS that is the subject of its own separate listing determination. *E.g., Fed. Opening Br.* at 27.

Nevertheless, FWS made the litigation choice not to appeal the district court's imposition of an additional procedural requirement to which the same reasoning would apply — a requirement to analyze the legal and functional effect of the GYE DPS on other grizzly bears in the lower-48. *Fed. Opening Brief* at 1-2; *Fed Reply Brief* at 8. FWS' litigation choice is not, however, a substitute for an act of Congress or agency adoption of implementing regulations to formally impose such a procedural requirement. Idaho challenges the district

court's application of this procedural requirement as preventing proper operation of the ESA as it applies in Idaho.

A. A comprehensive review of the lower-48 grizzly bear listing is not required to designate and delist the GYE DPS.

The district court relied on *Humane Society* to require FWS to conduct a comprehensive, 5-factor review of the "remnant" of the lower-48 grizzly bear listing before designating and delisting the GYE DPS. FED-ER 30. In response, Plaintiffs agree the ESA does not require such a review, and state they did not request one. *NCT Br.* at 35-6. As such, this Court's reversal of that district court holding is warranted.

B. An analysis of the legal and functional effect on grizzly bears in the lower 48 outside the GYE DPS is not required to designate and delist the DPS.

Plaintiffs rely on *Humane Society* for requiring analysis of the legal and functional impact on lower-48 grizzly bears outside the GYE DPS before FWS could identify a different conservation status — in this case a delisting —for the GYE DPS. *NCT Brief* at 24, *citing Humane Soc'y*, 865 F.3d at 600. Such a court-imposed requirement is contrary to this Court's precedent.

The ESA has related but distinct requirements for listing determinations for species--whether to list, downlist, uplist or delist, 16 U.S.C. § 1533(a)(1), and as to conducting periodic reviews of a listed entity's status, 16 U.S.C. §

1533(c)(2). The ESA requires a "five-factor" analysis of threats based on "best available science" for all four types of listing determinations, applicable to species, subspecies and DPSs. 16 U.S.C. §§ 1533(a)(1), (b)(1)(A). There is no language in this provision explicitly requiring an analysis of the functional and legal impact to any entity other than the species/subspecies/DPS whose status is being reviewed. The ESA separately requires FWS to review the status, "at least once every five years," of each listed species/subspecies/DPSs. 16 U.S.C. § 1533(c)(2)(A).

Humane Society recognized the ESA allows contemporaneous review of "any and all composite segments or subspecies that might be included within a taxonomically listed species." *Humane Soc'y* 865 F.3d at 601. However, an allowance to do so is not an explicit requirement. Nor do the requirements of 16 U.S.C. § 1533(c)(2) — to periodically review each listed "species" and identify whether there should be any change in the species' status — graft additional procedures onto the explicit requirements of §1533(a) for making listing determinations for a "species," in this case a DPS. *Humane Society* did not recognize those important distinctions.

Humane Society held the ESA "explicitly" requires a remnant analysis when simultaneously designating and making a determination to delist a DPS that is within a listed entity; it held FWS "cannot review a single segment with

blinders on." *Id.* at 601. However, there simply is no statutory or regulatory mandate[3] to conduct the analyses prescribed by *Humane Society* for DPS delisting. *Humane Society* correctly interpreted the ESA as providing the power "to designate genuinely distinct population segments…." *Humane Soc'y*, 865 F.3d at 603; 16 U.S.C. § 1532(16) (the term "species" includes any distinct population segment of any vertebrate species). However, *Humane Society* failed to limit its decision to procedures enumerated by the ESA for listing determinations for such DPSs. *See* 16 U.S.C. § 1533 (a)(1) (listing decisions "determine whether any species is an endangered or a threatened species"). The five-factor analysis considers threats to a DPS based on curtailment of "its habitat or range" and other factors affecting "its continued existence." 16 U.S.C. § 1533(a)(1)(A), (E) (emphasis added). The ESA's 5-factor analysis

[3] The closest analog to the court-imposed procedures in *Humane Society* that is explicit in the ESA or its implementing regulations arises in the context of experimental populations. But those are not at issue here. *See* 50 C.F.R. § 17.81(b) (requiring release of an experimental population consider "any possible adverse effects on extant populations of a species as a result of removal of individuals…for introduction elsewhere" and "the relative effects the establishment of an experimental population will have on the recovery of the species…").

This Court has reviewed language differences among implementing regulations to determine the absence of a statutory mandate. *Conservation Congress,* 720 F.3d at 10565-6 (determining the absence of a requirement for cumulative effects analysis in informal consultations).

does not enumerate a requirement to look at threats the DPS being review might pose to others.

Instead of applying the ESA's explicit procedural requirements, the *Humane Society* court chose to impose its own notions of procedures to prevent what it considered delisting by "balkanization." *Humane Soc'y,* 865 F.3d at 603. In applying *Humane Society* to impose judicially derived procedures, the district court's holding is inconsistent with this Court's precedent. *Conservation Congress,* 720 F.3d at 1056.

Successful implementation of the ESA provides federal protection to those species/subspecies/DPSs that need it, and promptly returns to state management those that are recovered. This outcome is of vital import to Idaho in achieving wildlife conservation in accord with its sovereign interests.[4]

The Court should reverse the district court's holdings as to the need for comprehensive review, and for analysis of the legal and functional impact on other bears in the lower-48, before making a listing determination for the GYE

[4] The *Humane Society* Court dismissed the effects of vacatur in prolonging ESA protections. *Humane Soc'y,* 865 F3d. at 615 ("The agency has failed repeatedly over the last sixteen years to make a delisting decision that complies with the APA, and it has not shown that vacatur here would be any more disruptive than it was on the Service's last three failed occasions."). Whatever this Court's decision, Idaho asks the Court to not dismiss the significance of vacatur to Idaho, and provide some regard for the collective effort invested by Idaho and its citizen to achieve species recovery, especially one involving considerable potential for conflict.

DPS. Neither the ESA nor its implementing regulations explicitly enumerate these procedures.

III. FWS reasonably concluded the GYE grizzly bear is not threatened by genetic factors.

Idaho incorporates by reference FWS' argument as to genetics. *Fed. Reply Brief* at 10-23.

Additional detail further bolsters FWS' argument. The 2017 Rule provides a rational explanation — based on best available science — as to why there was a change from prescribed translocation in the 2007 rule to translocation-if-warranted in the 2017 rule:

> In light of new information in Kamath *et al.* (2015, entire) documenting stable levels of heterozygosity and a current effective population size of 469 animals (Kamath *et al.* 2015, p. 5512), the deadline of 2020 for translocation is no longer contained in the 2016 Conservation Strategy.

FED-ER 117.

The agencies' revision of the translocation requirement in the Conservation Strategy exemplifies "adaptive" management based on best available science. U.S. and Canada scientists published a peer-reviewed paper in the journal Molecular Ecology, whose results were based on the genotyping of 729 grizzly bears in the GYE using 20 micro-satellite collars. FED-ER 400. FWS, as well as the other signatories to the Conservation Strategy, reasonably

concluded that the underlying assumptions regarding translocation over the course of 10 years warranted change to Conservation Strategy provisions.

The Court should reverse the holding regarding genetic health and translocation as an impermissible substitution of the district court's judgment on a scientific matter. *San Luis & Delta-Mendota Water Authority*, 747 F.3d 581, 602 (9th Cir. 2014) ("most deferential" standard of review for scientific determinations within the agency's area of expertise).

IV. FWS reasonably concluded that regulatory mechanisms for managing mortality were adequate for delisting the GYE DPS.

A. FWS' determination of regulatory mechanism adequacy reasonably relies on continued use of Chao2 and an interagency approval process for a change in estimator to occur.

In the 2017 Final Rule, FWS rationally explained its reliance on the "adequacy" of existing mechanisms related to post-delisting management of mortality for the recovered GYE DPS. *E.g.,* FED-ER 145-7. The district court identified a single inadequacy in the regulatory mechanisms for the GYE DPS— namely, the absence of a general commitment in the Conservation Strategy to recalibrate population estimates to those for 2002-2014 in the event that the parties were to switch from the Chao2 estimator to a future and speculative "better" estimator. *HSUS Brief* at 13; FED-ER 35. Plaintiffs'

arguments in favor of the district court's decision simply repeat the same errors made by the district court.

There was no provision for recalibration in the 2007 Conservation Strategy, and the Court upheld regulatory mechanisms as adequate without one. *Greater Yellowstone Coalition,* 665 F.3d at 1032 (review of 2007 delisting rule). The additional regulatory mechanisms adopted by states and federal agencies in the decade between delisting rules should only strengthen that assessment. *See, e.g.,* FED-ER 112-113 (reviewing states' adoption of additional mechanisms for limiting discretionary mortality).

In the process of finalizing Conservation Strategy revisions in 2016, NPS and FWS proposed the addition of language for "recalibration" of any estimator replacing the conservative Chao2 estimator, based on estimates for the 2002-2014 time period. *Idaho's Opening Brief* at 23-24. This issue related to the potential for a more precise estimator to identify significantly more bears in the GYE DPS above the 500-bear minimum population criterion for recovery. FWS wanted assurance the States would not overharvest bears or otherwise manage for rapid population decline. *See id; see also, e.g.,* 147 (Final Rule summarizing comments on recalibration and concern with overharvest with adoption of a "more accurate estimate method").

The States disagreed with the proposal because it appeared to continue federal standards commensurate with—or greater than-- those required by the ESA for post-delisting management. *See, e.g.,* FED-ER 147 (describing comments concerning restriction on adaptability of future management by dictating how a new population estimator would be applied); *see also Greater Yellowstone,* 665 F3d. at 1032 ("delisting cannot require the imposition of legal protections commensurate with those provided by the ESA").

As FWS explains in the Final Rule, the 2016 Conservation Strategy ultimately resolved the issue by choosing another path. The signatory agencies committed to continuing Chao2 for the foreseeable future and applying best available science. They also committed to not changing estimators without public comment and an agency approval process applying best available science. FED-ER 97 (Final Rule); FED-ER 271 (Conservation Strategy). Notably, the Conservation Strategy is signed by two FWS regional directors, the NPS regional director, 4 USFS Regional Supervisors, 3 BLM State Directors, and the Directors of the wildlife management agencies of Montana, Wyoming and Idaho.[5] FED-ER 236.

[5] Plaintiffs also cite FWS staff email concerns about membership and voting procedure of the Yellowstone Grizzly Coordinating Committee. *HSUS Brief* at 33. The YGCC's membership includes NPS, USFS, BLM, state wildlife management agencies, and tribal and local government entities. FWS remains as an ex-officio member, reflective of the transfer of management

By their signatures, these state and federal agencies agreed the final language addressed their respective agencies' science-based determinations that there was no threat to the recovered population with the alternate language in place. FED-ER 236-7. Indeed, it strains credulity that representatives from four federal agencies involving two Cabinet Departments would all "capitulate" to language if they thought it would allow rapid population declines or overharvest to threaten endangerment of the recovered DPS. The record reflects evolution of language to satisfy all parties, including FWS.

Plaintiffs' argument, which the district court adopted, relies on a flawed premise. Because FWS identified a need for a recalibration provision to address its concern, Plaintiffs assert a specific recalibration provision was the only way to satisfy that concern. *HSUS Brief* at 36-7. However, the ESA does not mandate that existing regulatory mechanisms be chosen unilaterally by FWS; instead, a listing determination is based on FWS' evaluation of whether existing regulatory mechanisms are inadequate for protecting the species from the threat of becoming endangered or extinct. 16 U.S.C. § 1533(a)(1)(D).

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authority from FWS to the states and NPS upon delisting. The IGBST lead scientist (from USGS) is also an ex-officio member. FED-ER 89. The Court can reasonably conclude this is not a setting for future "rogue" state action as to adoption of an estimator to replace Chao2.

In adopting a final delisting rule, FWS reviewed regulatory mechanisms for limiting mortality, which included the commitment for continued use of Chao2 and an approval process for an as-yet undetermined replacement for Chao2, in lieu of a commitment for recalibration. *E.g.,* FED-ER 97, 146-7. FWS found the mechanisms for limiting mortality adequate for a delisting determination. FED-ER 206. By focusing on a measure the agencies evaluated but did not adopt for mortality limits, and on the potential for individual bear deaths, Plaintiffs ignore the mechanism that was adopted and the numbers of live bears that would remain in the recovered population.

Idaho and other state and federal signatories to the 2016 Conservation Strategy committed to using Chao2 for the foreseeable future. Plaintiffs agree "it is universally acknowledged that Chao2 is a "highly conservative" estimator—more conservative than any other currently known protocol." *HSUS Brief* at 38. By all accounts, continued use of this estimator provides ample protection to the DPS in managing mortality. The record clearly supports FWS' determination that continued reliance on Chao2 addressed its concerns regarding the potential for overharvest and rapid decline of the DPS. *Idaho Opening Brief* at 28. (IGBST lead scientist's description of conservative management decisions resulting from Chao2, and peer reviewer statement

identifying fewer management allowances under Chao 2 for harvest and other discretionary mortality).

Despite their own recognition of the conservative effect of continued use of Chao2 on mortality management, Plaintiffs portray statements supporting FWS' reliance on it as "insufficient" and "post-hoc rationalizations." *HSUS Brief* at 31. However, the record is to the contrary. In finalizing the 2016 Conservation Strategy revisions, FWS' Director, in communications with the NPS Director and USFS Chief, described how the alternative of continued use of Chao2 would provide a more protective outcome for grizzly bears than the recalibration. *See*, *e.g.,* ID-ER 48 ("we have the strongest agreement we can get….the states reluctance to discuss 'recalibration' is really to the bears' advantage… [Chao2] is a very conservative estimator, so locking it in as the estimator actually will under-allocate harvest….the harvest targets will become proportionately smaller").

FWS' Director communicated this outcome in a formal memo to NPS' Director:

> Because the model-averaged Chao2 method is widely understood to underestimate population size by up to 50 % (study citation omitted), we consider the use of the Chao2 population estimator to be a conservative, protective approach for managing to the population objective.

WY-SER-145. Making decisions on conflict removal and hunting seasons based on a significant underestimate of bears clearly addresses the "overharvest" and "rapid decline" concerns that prompted FWS to seek recalibration in the first place.

The Court should uphold FWS' determination under the APA's "highly deferential" standard without need for further examination. *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)

B. The record supports FWS rationale in the delisting rule.

Should it proceed with a *de novo* record review, however, the Court will see that FWS reasonably relied upon the alternative language agreed upon by the Conservation Strategy signatories to resolve its concerns about the potential for overharvest or rapid decline. The Court will also find that Plaintiffs' argument that a recalibration provision was the only way FWS could find regulatory mechanisms adequate is based on a fast-and-loose characterization of the record.

Plaintiffs rely on outdated references, out-of-context emails and other items that clearly do not overcome the deference owed the agency's determination. Their proffered materials are sizzle without substance. For example, Plaintiffs rely on an FWS email commenting on proposed edits to

Appendix C of the Conservation Strategy, "This is completely unacceptable and will not pass peer review or the red face test." *HSUS Brief* at 18-9. However, the record shows the edits in question were in fact not accepted in Appendix C. This FWS staff commentary thus is of little consequence in an APA review of FWS' assessment of the adequacy of the language that is in the Conservation Strategy for limiting mortality. *Compare* JSER 1254 (source document for "red face test" quote referencing proposed edits for Appendix C) *with* ID-FER 16-19 (Appendix C from Final Conservation Strategy, which does not contain the draft language associated with the "red face" quote).

Other quoted emails are likewise inapplicable. For example, Plaintiffs refer to an October 28 email stating, "If they vote to accept this, it is a violation of the mandate of the ESA…." *HSUS Brief* at 30. Plaintiffs state this commentary "characterizes this decision" on the language adopted in lieu of a recalibration provision. However, the record shows this email was not about the FWS decision to choose an alternate path. Instead, the October 28 email, and other statements upon which Plaintiffs rely, preceded a November 4 meeting of the state and federal agencies to consider language revisions to the Strategy for post-delisting management. Plaintiffs fail to provide the Court with the context that the outcome of this referenced vote was specifically not to

accept the proposal the email referenced. JSER-5; *see Idaho Opening Brief* at 24 (discussing October 28 "vote" and "show stopper" emails).

Similarly, NPS and USFS staff communications about recalibration cited by Plaintiffs pre-date the language ultimately included in the Final Conservation Strategy signed by the states, FWS, USFS, NPS, and BLM in December 2016. *See* JSER 1268-1270, 1271, 1273-4 (July and August 2016 emails between FWS and NPS staff, and an October 2016 Forest Service position statement) (cited by *HSUS Brief at 19-20*). These communications do not contain pronouncements about the language subsequently agreed upon.

Plaintiffs quote the district court's conclusions about "a deal" and "concessions," but the district court reached those conclusions based upon language from record materials such as the October 28 "vote" email discussed *supra,* which were speculative pronouncements on outcomes that did not in fact occur.[6] *See, e.g.,* FED-ER 36-37 (district court citing comment from the

[6] Plaintiffs make reference to Servheen's evaluation of language "defensibility," most of which is clearly related to draft language that was ultimately not adopted. "Defensibility" is not the appropriate legal standard. Moreover, Servheen's calculation of "defensibility" quotes the dissent in this Court's 2011 opinion, portions of the district court's holdings on regulatory mechanisms, which this Court reversed, and overextends this Court's holdings regarding whitebark pine to mortality management. *Compare* JSER 1226 (Servheen comments referring to "9th circuit dissenting opinion (the outline for plaintiffs in the next case);" quoting language from "Judge Molloy" on adequacy of regulatory mechanisms, holdings reversed by this court; and quoting this Court's language regarding "scientific uncertainty," which applied not to

"vote" email language referenced above). Plaintiffs conjure a position of the Service on recalibration based on FWS emails about rejected draft language. They build upon this erroneous premise by adding quotes from the district court's conclusions, which relied on these same inapplicable materials. *See HSUS Brief* at 29, *citing* FED-ER 33 (district court conclusion quoting "vote" email; and "show-stopper" language inapplicable to final language, FED-ER 36-37, the inapplicability of which is discussed in *Idaho Opening Brief* at 23-4). Plaintiffs' narrative of the record is an echo chamber of error, and should be rejected.

It is the FWS' final determination that is entitled to deference. *See Motor Vehicle Manufacturer's Ass'n*, 463 U.S. at 43 (highly deferential standard for APA agency review); *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). In light of the ESA and APA's deference to the agency's ultimate rulemaking decisions, Idaho need not delve into further detail as to why other molehills are not the mountains Plaintiffs would make them.

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mortality management, but to whitebark pine declines) with *Greater Yellowstone,* 665. F3d 1015.

The 2017 rule has done all the ESA requires: FWS (1) considered the relevant materials; (2) articulated a satisfactory explanation for its reliance on commitments in the 2016 Conservation Strategy and other various regulatory mechanisms for limiting mortality; and (3) made no clear error of judgment. *Alaska Oil & Gas Ass'n v. Pritzker,* 840 F.3d 671, 683-4 (9th Cir. 2016) (citation omitted).

C. The district erred in its holdings regarding best available science applicable to a potential change in population estimator.

Forcing a commitment to recalibrate an as-yet unknown estimator at a time unknown, and prescribing that future recalibration be forever tied to the 2002-2014 time period, is counter to the purpose of the ESA's "best available science requirement. *See Bennett v. Spear,* 520 U.S. 154 (1997) (the ESA is "not to be implemented haphazardly, on the basis of speculation or surmise").

The district court's determination on "best available science" is based on an incorrect finding that the agencies "deleted" the best available science for changing the estimator. *Idaho Opening Brief* at 27 (discussing the district court's error in relying on a Servheen email admittedly based on a "quick read." However, the interagency commitment to apply best available science remained in the main body of the Conservation Strategy, and would apply to any decision to change the estimator for calculating mortality limits. FED-ER

276, 319. The district court erred in relying on a staff error made in haste and substituting it for findings in the final rule reflective of the commitment to best available science that remained in the signed Conservation Strategy. FED-ER 97 (Final Rule); FED-ER 271. Additionally, the district court's findings as to best available science are not entitled to this Court's deference in reviewing the record *de novo*. *San Luis & Delta-Mendota Water Authority*, 776 F.3d 971, 991 (9th Cir. 2014).

Plaintiffs' arguments refer to the need for recalibration as "best available science." However, the district court's requirement for a general commitment to recalibration is to the contrary. Prescribing recalibration to the 2002-2014 timeframe for an as yet-undetermined population estimator, at some time in the indefinite future, improperly constrains the best available science of tomorrow to that available today.

Plaintiffs point to record materials to assert potential imminence of a switch to a new estimator, such as Mark-Resight. *HSUS Brief* at 33-4. But the materials upon which Plaintiffs rely are outdated. Although the IGBST continues to use the Mark Resight estimator for some purposes, the final rule explains that it is insufficient to replace Chao2 for detecting changes in population trend. FED-ER 147.

Ultimately, speculation as to the results of the switch to the as-yet-known estimator that might improve upon Chao2's ability to analyze trend is a moot point. The best available science that should apply to a future decision does not yet exit: between now and that future date, there will be interim reviews of vital rates, estimator methods, and other scientific advancements. Plaintiffs' argument indirectly supports that outcome.

> 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.'

HSUS Brief at 33, quoting FED-ER 375.

The Final Rule explains the longstanding process in place to ensure "best available science" will continue to apply. FED-ER 147 (discussing the IGBST's frequent review of protocols and techniques for population estimation and trend analysis, and current use of four different estimation techniques); *see also Fed. Reply Brief* at 41 (discussing IGBST's continued monitoring of vital rates and mortality, and updating rates and ratios if they change).

In defense of the district court's judgment, Plaintiffs' arguments also evidence fundamental misunderstanding of the Conservation Strategy demographic criteria and their relation to the population estimator. For example, Plaintiffs quote David Mattson as stating that it's "even more

problematic, a population at the threshold of 500…could suddenly be increased to 700, well above such a trigger." *HSUS Brief* at 17-18.

This statement has no bearing on the merits of continued use of Chao2 versus a recalibration provision. It relates to the demographic criterion for a minimum population of 500 bears for genetic health, a minimum which applies regardless of the population estimator used. FED-ER 95 (Demographic Criterion 1).

If an improved estimator determined there were 700 bears where Chao2 had only found 500, that would simply mean the new estimator identified 200 bears above the minimum population level. More bears above the minimum is not a defect under the ESA that renders regulatory mechanisms inadequate.

The criterion to which the recalibration discussion relates is one of mortality rates -- percentages used to identify annual mortality limits. Larger population levels generally translate to more individual mortality, but additional mortality is not a threat, so long as the overall mortality *rates* remain within sustainable limits. FED-ER 96 n. 1 (annual mortality limits are based on a mortality percentage of the respective population segment relative to the population estimate); *see also Fed. Reply Brief* at 33 n.6. Under the Conservation Strategy, the IGBST will conduct periodic reviews of mortality rates and

allowable total mortality limits to maintain the DPS as a recovered population. *See* FED-ER 116 (describing IGBST review process).

The 2017 Final Rule and record support FWS' conclusion that the Conservation Strategy's commitment to continued use of the Chao2 estimator for the foreseeable future, continued reliance on best available science, and an interagency approval process before a change in estimator could occur is adequately protective of a delisted GYE DPS. Based on "highly deferential" standard of APA review, the Court should reverse the district court and find FWS reasonably concluded regulatory mechanisms for the GYE DPS are adequate.

V. Idaho incorporates by reference FWS' response to other arguments raised by Plaintiffs and by Mr. Aland's cross-appeal.

Idaho generally incorporates by reference FWS' response to other arguments raised by Plaintiffs and to the arguments of Mr. Aland on cross-appeal.

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 18th day of October, 2019.

LAWRENCE G. WASDEN
Attorney General
DARRELL G. EARLY
Chief Deputy Attorney General
Natural Resources Division
STEVEN STRACK

s/ Kathleen E. Trever
KATHLEEN E. TREVER
Deputy Attorney General
Counsel for Appellant State of Idaho

CERTIFICATE OF COMPLIANCE FOR BRIEFS

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 7,360 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 longer length limit for a reply brief permitted by Cir. R. 32-2(b) because of filing a single brief replying to multiple briefs.

Signature: s/Kathleen E. Trever **Date:** October 18, 2019

ADDENDUM

Except for the following, all applicable statutes, etc. are contained in the Corrected Opening Brief Addendum For the Federal Appellants (Dkt. 116, 9/17/2019.

Endangered Species Act, §3, 16 U.S.C. § 1532

§1532 Definitions

* * *

(3) The terms ‘‘conserve’’, ‘‘conserving’’, and ‘‘conservation’’ mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

***

(19) The term ‘‘take’’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

***

Endangered Species Act, §9, 16 U.S.C. § 1538 Prohibitions

§1538 Prohibited acts

(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

***

(B) take any such species within the United States or the territorial sea of the United States;

***

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

Idaho Code, Title 36 (Fish and Game), Chapter 2, Classifications and Definitions, § 36-202

§ 36-202 (Definitions)

(h) "Trophy big game animal" means any big game animal deemed a trophy as defined in this subsection. For the purpose of this section, a score shall be determined from the antlers of the mule deer, white-tailed deer or elk as measured by the copyrighted Boone and Crockett scoring system. The highest of the typical or nontypical scores shall be used for determining the total score.

1. Mule deer: any buck scoring over one hundred fifty (150) points;

2. White-tailed deer: any buck scoring over one hundred thirty (130) points;

3. Elk: any bull scoring over three hundred (300) points;

4. Bighorn sheep: any ram;

5. Moose: any bull;

6. Mountain goat: any male or female;

7. Pronghorn antelope: any buck with at least one (1) horn exceeding fourteen (14) inches;

8. Caribou: any male or female;

9. Grizzly bear: any male or female.

Idaho Code, Title 36 (Fish and Game), Chapter 4, Licenses to Hunt, Fish and Trap, § 36-416

§ 36-416 (Schedule of License Fees)

***

Grizzly Bear Tag -- Resident 198.00 – Non-Resident 2,100.00

***

Controlled Hunt Application Fee – Moose, Sheep, Goat, Grizzly Bear -- Resident 15.00 – Non-Resident 40.00

***

Idaho Code, Title 36 (Fish and Game), Chapter 11, Protection of Animals and Birds, § 36-1101

§ 36-1101

36-1101. TAKING OF WILDLIFE UNLAWFUL EXCEPT BY STATUTE OR COMMISSION RULE OR PROCLAMATION -- METHODS PROHIBITED -- EXCEPTIONS.

(a) It is unlawful, except as may be otherwise provided by Idaho law, including this title or commission rules or proclamations promulgated pursuant thereto, for any person to take any of the game animals, birds or furbearing animals of this state.

***

Idaho Code, Title 36 (Fish and Game), Chapter 11, Protection of Animals and Birds § 36-1107

36-1107. WILD ANIMALS AND BIRDS DAMAGING PROPERTY. Other provisions of this title notwithstanding, any person may control, trap, and/or remove any wild animals or birds or may destroy the houses, dams, or other structures of furbearing animals for the purpose of protecting property from the depredations thereof as hereinafter provided. The director may delegate any of the authority conferred by this section to any other employee of the department.

(a) Director to Authorize Removal of Wildlife Causing Damage. Except for antelope, elk, deer or moose when any other wildlife, protected by this title, is doing damage to or is destroying any property, including water rights, or is likely to do so, the owner or lessee thereof may make complaint and report the facts to the director or his designee who shall investigate the conditions complained of. In the case of water rights, the director shall request an investigation by the director of the department of water resources of the conditions complained of. The director of the department of water resources shall request a recommendation from the local water master, if any and, upon such examination, shall certify to the director of the department of fish and game whether said wildlife, or houses, dams or other structures erected by said wildlife, is injuring or otherwise adversely impacting water rights. If it appears that the complaint is well-founded and the property of such complainant is being or is likely to be damaged or destroyed by any such wildlife protected under this title, the director may:

1. Send a representative onto the premises to control, trap, and/or remove such protected wildlife as will stop the damage to said property. Any animals or birds so taken shall remain the property of the state and shall be turned over to the director.

2. Grant properly safeguarded permission to the complainant to control, trap and/or remove such protected wildlife or to destroy any houses, dams, or other structures erected by said animals or birds. Any protected wildlife so taken shall remain the property of the state and shall be turned over to the director.

***

(g) Control of Depredation of Grizzly Bears. For purposes of this section, "grizzly bear" means any grizzly bear not protected by the federal endangered species act. Grizzly bears may be disposed of by livestock or domestic animal owners, their employees, agents and animal damage control personnel when the same are molesting or attacking livestock or domestic animals and it shall not be necessary to obtain any permit from the department. Grizzly bears so taken shall be reported to the director within seventy-two (72) hours, with additional reasonable time allowed if access to the site where taken is limited. Grizzly bears so taken shall remain the property of the state. Livestock and domestic animal owners may take all nonlethal steps they deem necessary to protect their property.

Idaho Code, Title 36 (Fish and Game), Chapter 11, Protection of Animals and Birds § 36-1109

36-1109. CONTROL OF DAMAGE BY BLACK BEARS, GRIZZLY BEARS OR MOUNTAIN LIONS -- COMPENSATION FOR DAMAGE.

(a) Prevention of depredation shall be a priority management objective of the department, and it is the obligation of landowners to take all reasonable steps to prevent property loss from black bears, grizzly bears or mountain lions or to mitigate damage by such. The director, or his representative, will consult with appropriate land management agencies and landusers before transplanting or relocating any black bear, grizzly bear or mountain lion.

(b) When any black bear, grizzly bear or mountain lion has done damage to or is destroying livestock on public, state, or private land, whether owned or leased, or when any black bear or grizzly bear has done damage to or is destroying berries, bees, beehives or honey on private land, the owner or his representative of such livestock shall, for the purposes of filing a claim, report such loss to a representative of the U.S. department of agriculture animal plant and health inspection services/animal damage control (APHIS/ADC) who shall, within seventy-two (72) hours, investigate the conditions complained of. For purposes of this section, livestock shall be defined as domestic cattle, sheep, and goats. For purposes of this section, grizzly bear shall be defined as any grizzly bear not protected by the federal endangered species act. If it appears that the complaint is well founded and livestock, berries, bees, beehives or honey of the complainant has been damaged or destroyed by such black bear, grizzly bear or mountain lion, APHIS/ADC shall so inform the owner or his representative of the extent of physical damage or destruction in question. The owner shall provide the director or the department's regional office with the APHIS/ADC determination of damages or destruction. The physical damages, without establishing a monetary value thereon, as determined by the APHIS/ADC representative shall be final, and shall be binding upon the owner or his representative and on the department.

(c) Any claim for damages must be in written form, shall be in the form of a claim for damages substantially the same as required in section 6-907, Idaho Code, shall be attested to by the claimant under oath, and the claim shall be for an amount of at least one thousand dollars ($1,000) in damages per occurrence. The department shall prepare and make available suitable forms for claims for damages. Claims may be submitted only for the fiscal year (July 1 through June 30) in which they occurred. Any person submitting a fraudulent claim shall be prosecuted for a felony as provided in section 18-2706, Idaho Code.

Idaho Code, Title 36 (Fish and Game), Chapter 14, General Penal Provisions, § 36-1401

§ 36-1401 VIOLATIONS.

***

(c) Felonies. Any person who pleads guilty to, is found guilty or is convicted of a violation of the following offenses shall be guilty of a felony:

1. Knowingly and intentionally selling or offering for sale or exchange, or purchasing or offering to purchase or exchange, any wildlife, or parts thereof, which has been unlawfully killed, taken or possessed.

***

3. Unlawfully killing, possessing or wasting of any combination of numbers or species of wildlife within a twelve (12) month period which has a single or combined reimbursable damage assessment of more than one thousand dollars ($1,000), as provided in section 36-1404, Idaho Code.

4. Conviction within ten (10) years of three (3) or more violations of the provisions of this title, penalties for which include either or both a mandatory license revocation or a reimbursable damage assessment.

Idaho Code, Title 36 (Fish and Game), Chapter 14, General Penal Provisions, § 36-1404

§ 36-1404. UNLAWFUL KILLING, POSSESSION OR WASTE OF WILD ANIMALS, BIRDS AND FISH — REIMBURSABLE DAMAGES — SCHEDULE — ASSESSMENT BY MAGISTRATES — INSTALLMENT PAYMENTS — DEFAULT JUDGMENTS — DISPOSITION OF MONEYS.

a) In addition to the penalties provided for violating any of the provisions of title 36, Idaho Code, any person who pleads guilty, is found guilty of or is convicted of the illegal killing or the illegal possession or illegal waste of game animals or birds or fish shall reimburse the state for each animal so killed or possessed or wasted as follows:

***

Provided further, that any person who pleads guilty, is found guilty of, or is convicted of illegal killing, illegal possession or illegal waste of a trophy big game animal as defined in section 36-202(h), Idaho Code, shall reimburse the state for each animal so killed, possessed or wasted, as follows:

***

9. Trophy grizzly bear: ten thousand dollars ($10,000) per animal killed, possessed or wasted.

***

Title 50 (Wildlife and Fisheries), Part 17 -- Endangered and Threatened Wildlife and Plants, Subpart D, Threatened Wildlife, 50 C.F.R. § 17.40

§ 17.40

***

(b) Grizzly bear (*Ursus arctos horribilis*)—

(1) *Prohibitions.* The following prohibitions apply to the grizzly bear:

(i) *Taking.*

(A) Except as provided in paragraphs (b)(1)(i)(B) through (F) of this section, no person shall take any grizzly bear in the 48 conterminous states of the United States.

(B) Grizzly bears may be taken in self-defense or in defense of others, but such taking shall be reported by the individual who has taken the bear or his designee within 5 days of occurrence to the Resident Agent in Charge, Office of Law Enforcement, U.S. Fish and Wildlife Service, 2900 4th Avenue North, Suite 301, Billings, MT 59101 (406-247-7355), if occurring in Montana or Wyoming, or the Special Agent in Charge, Office of Law Enforcement, U.S. Fish and Wildlife Service, P.O. Box 9, Sherwood, OR 97140 (503-521-5300), if occurring in Idaho or Washington, and to appropriate State and Tribal authorities. Grizzly bears taken in self-defense or in defense of others, including the parts of such bears, shall not be possessed, delivered, carried, transported, shipped, exported, received, or sold, except by Federal, State, or Tribal authorities.

(C) *Removal of nuisance bears.* A grizzly bear constituting a demonstrable but non immediate threat to human safety or committing significant depredations to lawfully present livestock, crops, or beehives may be taken, but only if:

(*1*) It has not been reasonably possible to eliminate such threat or depredation by live-capturing and releasing unharmed in a remote area the grizzly bear involved; and

(*2*) The taking is done in a humane manner by authorized Federal, State, or Tribal authorities, and in accordance with current interagency guidelines covering the taking of such nuisance bears; and

(*3*) The taking is reported within 5 days of occurrence to the appropriate U.S. Fish and Wildlife Service law enforcement office, as indicated in paragraph (b)(1)(i)(B) of this section, and to appropriate State and Tribal authorities.

Title 50 (Wildlife and Fisheries), Part 17 -- Endangered and Threatened Wildlife and Plants, Subpart H – Experimental Populations, 50 C.F.R. § 17.81

§17.81 Listing.

(a) The Secretary may designate as an experimental population a population of endangered or threatened species that has been or will be released into suitable natural habitat outside the species' current natural range (but within its probable historic range, absent a finding by the Director in the extreme case that the primary habitat of the species has been unsuitably and irreversibly altered or destroyed), subject to the further conditions specified in this section; *provided,* that all designations of experimental populations must proceed by regulation adopted in accordance with 5 U.S.C. 553 and the requirements of this subpart. (b) Before authorizing the release as an experimental population of any population (including eggs, propagules, or individuals) of an endangered or threatened species, and before authorizing any necessary transportation to conduct the release, the Secretary must find by regulation that such release will further the conservation of the species. In making such a finding the Secretary shall utilize the best scientific and commercial data available to consider:

(1) Any possible adverse effects on extant populations of a species as a result of removal of individuals, eggs, or propagules for introduction elsewhere;

(2) The likelihood that any such experimental population will become established and survive in the foreseeable future;

(3) The relative effects that establishment of an experimental population will have on the recovery of the species; and

(4) The extent to which the introduced population may be affected by existing or anticipated Federal or State actions or private activities within or adjacent to the experimental population area.

*** *** ***

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 October 18, 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:

Robert H. Aland
140 Old Green Bay Road
Winnetka, IL 60093-1512

s/ Kathleen E. Trever
KATHLEEN E. TREVER
Counsel for Appellant State of Idaho