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.,
Defendant-Intervenor-Appellants

On Appeal from 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)

APPELLANTS STATE OF MONTANA AND MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS' REPLY BRIEF

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GLOSSARY

APA ..... Administrative Procedure Act

DPS ..... Distinct Population Segment

E.R. ..... Federal Appellants' Excerpts of Record

ESA ..... Endangered Species Act

GYE ..... Greater Yellowstone Ecosystem

IGBC ..... Interagency Grizzly Bear Committee

MFWP ..... Montana Department of Fish, Wildlife and Parks

MSER ..... Montana Supplemental Excerpts of Record

FWS ..... United States Fish and Wildlife Service

INTRODUCTION

Plaintiffs Crow Indian Tribe and other consolidated organizational Plaintiffs ("Plaintiff Appellees") raise the issues of standing and redressability in their briefs filed in this appeal on July 29, 2019. Plaintiff Appellees Alliance for the Wild Rockies, Western Watersheds Project and Native Ecosystems Council ("Alliance") argue that because the Federal Appellants did not appeal the judgment or vacatur issued in the Tribes' and Conservation Groups' favor, this Court lacks jurisdiction over the Federal Appellants' appeal. *See* Doc. 93. at 6-13. Alliance then argues that because Appellant Intervenors do not establish standing, they cannot carry the appeal for Federal Appellants. Doc. 93 at 13 *et. seq*. Plaintiff Appellees Crow Indian Tribe et.al. and WildEarth Guardians also argue that this Court lacks jurisdiction to hear this case. *See* Docs. 91 and 96. Plaintiff Appellees also address substantive issues raised by Federal Appellants and Defendant Intervenor Appellants. Appellant Intervenors State of Montana and Montana Department of Fish, Wildlife and Parks ("Montana") submit this reply brief to rebut these arguments.

SUMMARY OF THE ARGUMENT

In its Response and Reply Brief (Doc. 124) Federal Appellants established that this Court has jurisdiction over its appeal because it seeks reversal of holdings governing the scope of the remand to the U.S. Fish and Wildlife Service ("FWS").

As a result, so long as Montana has standing, which it does, this Court has jurisdiction to hear Montana's appeal. In addition, this Court has jurisdiction over elements of the District Court's Order that were not briefed by Federal Appellant but that were raised by Montana in its opening brief.

ARGUMENT

I. This Court has Jurisdiction to Hear Federal Appellants' Appeal.

In its Notice of Appeal, the Federal Appellants appealed broadly from the District Court's October 23, 2018 Judgment (ECF 275) and the District Court's September 24, 2018 Order (ECF 266). 2 E.R. 58. Thus, Federal Appellants' appeal initially included all aspects of the Court's Order including remand and vacatur. It wasn't until Federal Appellants' Opening Brief that it qualified the scope of its appeal, explaining that it was primarily focused on the district court's conclusion that FWS "must conduct a 'comprehensive review' of the entire listed species" and the court's improper substitution of its own scientific judgment for FWS' on the question of the genetic fitness of the GYE DPS. Doc. 45 at 1-2. Clearly, Federal Appellants sought judicial review of certain elements of the District Court's Order and, contrary to Plaintiff Appellees' characterization, did not accept the remand in its entirety.

In its Response and Reply Brief (Doc. 124), Federal Appellants demonstrate that this Court has jurisdiction over its appeal, and that its appeal is redressable by

this Court. Montana joins these arguments. Thus, so long as Montana has standing to appeal, the District Court's Order is redressable by this Court at least to the extent of the issues raised by Federal Appellants. But Montana is also entitled to appellate review of all the issues that it addressed in its Opening Brief.

II. This Court has Jurisdiction to Hear Montana's Appeal.

A. Montana Is Entitled to Bring Its Own Appeal

Plaintiff Appellee WildEarth Guardians asserts that since Federal Appellants do not have standing to pursue their appeal, Montana and other Intervenor Appellants do not have standing. Doc. 91 at 24. For the reasons set forth in Federal Appellants' Response and Reply Brief, Federal Appellants do in fact have such standing and the argument to the contrary is incorrect. But even if it were true as applied to Federal Appellants, Montana nonetheless has standing to pursue its appeal under an exception this Court has recognized to the general rule that remand orders are final decisions of a district court. *See Alsea Valley Alliance v. DOC*, 358 F.3d 1181, 1184 (9th Cir. 2004).

"A remand order will be considered 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.* (internal quotations and citations omitted).

A second exception to the finality rule applies when "where the relief sought by appellants cannot possibly be achieved through the district court's directions. Such meaningless remands are anathema to judicial economy." *United States v. United States Bd. of Water Comm'rs*, 893 F.3d 578, 595 (9th Cir. 2018)(internal quotations and citations omitted).

Here, the relief sought by Montana cannot be achieved through the district court's directions. On the issue of recalibration, the District Court found that FWS' failure to require a recalibration provision in the Conservation Strategy was arbitrary and capricious. 1 E.R. 32. The District Court stated that "rather than rationally consider and apply the best available science, as demanded by the [Administrative Procedures Act (5 U.S.C. § 551 et seq.)] and the [Endangered Species Act (16 U.S.C. §1531, *et seq.* ("ESA")], it made a concession to the state to secure their participation in the Conservation Strategy." 1 E.R. 36. It concluded that the "Service cannot negotiate away its obligation to make decisions 'solely on the basis of the best available science'." 1 E.R. 40.

As Montana argued in its Opening Brief, the Chao2 population estimator is the best available science and it was purely speculative for the district court to predict not only that it will be replaced but also what it might mean for the species if that occurs. Doc. 56 at 17-23. Federal Appellant's briefing does not address this issue. Therefore, it appears likely that on remand, FWS will feel it necessary to

include recalibration in a new conservation strategy, despite the current lack of an alternate population estimation method demonstrably superior to Chao2. Moreover, the District Court's finding that FWS negotiated away its obligation to make decisions based on the best available science is at odds with the facts and also runs counter to the ESA's purpose of fostering state cooperation in the conservation of threatened or endangered species. *Humane Society v. Zinke*, 865 F.3d 585, 598 (D.C. Cir. 2017). In the GYE, Montana, Wyoming and Idaho cooperated in the recovery of the grizzly bear and in planning for post-delisting management. This planning, which not only involved the three states but several national forests and the U.S. Park Service, necessarily involved some negotiation and compromise regarding how the best available science *informs* post-delisting management. This is entirely consistent with the ESA's mandates, and the District Court's contrary finding directly impairs Montana's interests. The legitimacy of the Conservation Strategy in this respect is therefore properly before this Court because the relief sought by Montana cannot be achieved through remand.

Further, the GYE delisting was remanded once already on the narrow grounds that FWS hadn't properly analyzed the impact of the loss of whitebark pine on the GYE grizzly bear. *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015 (9th Cir. 2011). It was six years before FWS published a new delisting rule and another two to get to this point. Judicial economy would be better served

by this Court deciding all issues in this case.

Alliance also asserts that this Court does not have jurisdiction to hear Montana' appeal because Montana does not seek reversal regarding the judgment or remedy issued by the District Court and does not establish Article III standing. Doc. No. 93 at 19. Alliance is incorrect. Montana first addresses the scope of its appeal.

B. Montana Seeks Reversal of the Remedy Ordered by the District Court.

Montana provided notice of appeal of the "Order granting Plaintiffs' motions for summary judgment, denying Defendants' cross motions for summary judgment, and vacating and remanding the Final Rule delisting the Greater Yellowstone Ecosystem grizzly bear (Doc. No. 266)." 2 E.R. 50. Unlike Federal Appellant, Montana did not later qualify the scope of its appeal regarding any aspect of the remand. It did, however, adopt Federal Appellants' *arguments* in its Opening Brief (Doc. 45) with respect to the impact of delisting the Yellowstone DPS on other grizzly bear populations." Doc. 56 at 15 (emphasis added). In other words, Montana adopted Federal Appellants' argument with respect to the Great Lakes Wolf decision (*Humane Society v. Zinke*, 865 F.3d 585). Montana thus also argued that the District Court went beyond the holding in Great Lakes Wolf and exceeded the mandate of the ESA when it ordered a "comprehensive review" of the species. 1 E.R. 30.

Montana also argued that the District Court erred with respect to its findings on the adequacy of regulatory mechanisms, specifically, that if a new population model were to be adopted sometime after delisting, the system of determining the allowable number of discretionary mortalities and allocating those mortalities to the states of Wyoming, Montana and Idaho would have to be adjusted to reflect the new model. Montana further argued, like Federal Appellants, that the District Court erred in rejecting FWS's conclusion that the GYE grizzly population is not threatened by genetic factors. Because Montana appealed the remand and vacatur and this Court has jurisdiction over Federal Appellants' appeal, or in the alternative the remand is a final decision as demonstrated above, Montana may proceed with this appeal so long as it has standing to do so.

C. Montana has Standing to Appeal the District Court's Order.

Federal Appellants briefing plainly demonstrates why they have standing to bring this appeal. "Where the legal issues on appeal are fairly raised by one plaintiff who had standing to bring the suit, the court need not consider the standing of the other plaintiffs." *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 918 (9th Cir. 2004). Therefore, Montana's independent standing should be irrelevant to this proceeding. Nonetheless, Montana has constitutional standing to appeal the District Court's Order independent of Federal Appellants or any other party.

States are common participants in judicial review of ESA-related decisions. There are numerous examples in the Ninth Circuit alone: *see*, *e.g.*, *Wildwest Inst. v. Kurth*, 855 F.3d 995 (9th Cir. 2017) (State of Wyoming intervened), *Northwest Resource Info. Ctr. v. National Marine Fisheries Serv.*, 56 F.3d 1060 (9th Cir. 1995); *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015 (9th Cir. 2011) (states of Wyoming, Montana and Idaho intervened). The U.S. District Court for the District of Maine invoked the doctrine of judicial notice in recognizing Maine's standing to participate in a case involving the listing of a distinct population of Atlantic salmon as endangered. *Maine v. Norton*, 257 F. Supp. 2d 357, 373 (D. Maine 2003).

To establish constitutional standing, the plaintiff must show (1) an actual or threatened injury which is concrete and particularized; (2) a causal connection between the injury and the conduct complained of; and (3) that it is likely the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Montana meets all three criteria.

1. Montana would suffer an actual, concrete and particularized injury by the continued listing of the GYE grizzly bear.

A state has been injured when the action it seeks to challenge injures one of its sovereign interests. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982). Montana has sovereign interests in the management and regulation of wildlife within its own borders. *Minnesota v. Mille Lacs Band of Chippewa*

Indians, 526 U.S. 172, 204 (1999); *Baldwin v. Fish and Game Comm'n*, 436 U.S. 371, 386 (1978). Montana also has a sovereign interest in enacting and enforcing its own legal code. *Alfred L. Snapp & Son, Inc.,* 458 U.S. at 601. These interests are evidenced by Montana statutes providing for management of fish and wildlife. The State of Montana through the Montana Department of Fish, Wildlife and Parks ("MFWP") and the Fish and Wildlife Commission ("Commission") have specific statutory mandates to manage and regulate wildlife and wildlife habitat. *See*, Mont. Code Ann. §§ 87-1-201 and 87-1-301. MFWP "shall supervise all the wildlife, fish, game and nongame birds, waterfowl, and the game and fur-bearing animals of the state…[It] possesses all powers necessary to fulfill the duties prescribed by law…." Mont. Code Ann. § 87-1-201(1). The Commission is to set polices for protection, preservation, management, and propagation of wildlife within the state. Mont. Code Ann. § 87-1-301(1)(a).

Pursuant to these statutory mandates and in anticipation of delisting, MFWP adopted a grizzly bear management plan for Southwest Montana, which includes the Montana portion of the Greater Yellowstone Area, and is incorporated into the final 2016 Conservation Strategy.[1] 2 E.R. 96. As an active member of all three interagency groups that help guide grizzly bear management in the GYE, Montana

[1] The 2016 Conservation Strategy will "guide post-delisting monitoring and management of the grizzly bear in the GYE." 2 E.R. 83.

helped lay the ground work for delisting and return to state management.[2] Montana adopted the Memorandum of Agreement Regarding the Management and Allocation of Discretionary Mortality of Grizzly Bears in the Greater Yellowstone Ecosystem (Tri-State MOA) on July 13, 2016. Thus, along with Idaho and Wyoming, Montana has committed to manage grizzly bears consistent with the 2016 Conservation Strategy, to use the best science to collectively manage grizzly bears and discretionary mortality. 2 E.R. 113. Without the 2017 Final Rule in effect, the 2016 Conservation Strategy is moot, the efforts of the states that went into it are wasted and, most importantly, the return to state management that it represents has been derailed. Accordingly, Montana and the other states have been injured.

Finally, Montana's Fish and Wildlife Commission may regulate the hunting of grizzly bears. Mont. Code Ann. § 87-5-302. As noted in Montana's Opening Brief, the Commission has adopted the Montana Grizzly Bear Hunting Regulations on February 11, 2016. Doc. 56 at 32. These regulations expired in 2017 and would need to be readopted to be in effect, but they establish a framework for how hunting grizzly bears in Montana post-delisting will be managed. *Id*. Hunting is

[2] The IGBST studies the grizzly bear and provides information necessary to informed management decisions. The IGBC coordinates management efforts and research action across federal lands and states to recover grizzly bears in the lower 48 states. The YES is a subcommittee of the IGBC and coordinates recovery efforts specific to the GYE. 2. E.R. 97.

prohibited by administrative rule promulgated under the ESA. 50 CFR 17.40(b). Thus, the ESA has divested the State of Montana of the ability to use hunting as a management tool as allowed by state law. For that and other reasons noted herein, Montana has suffered an actual, concrete and particularized injury by the continued listing of the GYE grizzly bear pursuant to the District Court's Order.

2. There is a causal connection between Montana's injury and the District Court's Order.

Montana's ability to regulate conservation and management of the grizzly bear is directly related to Plaintiff Appellees' claims that led to the District Court Order that perpetuated the listed status of the grizzly bear and vacated the 2017 Final Rule. As noted above, this Order divested Montana of its authority to manage grizzly bears in the Montana portion of the GYE and instead re-conferred that power on the federal government under the ESA. The supremacy clause of the United States Constitution (U.S. Const. art. VI, cl. 2), essentially nullifies any State law or regulation that permits an activity that, under the ESA, would be considered a "take" of listed species. *Maine v. Norton*, 257 F. Supp. 2d 357, 374. In addition, ESA expressly preempts state law. 16 U.S.C. § 1535(f). Thus, the District Court's ruling directly injures Montana's sovereign interests in managing wildlife within its borders and in enacting and enforcing its own legal code.

3. It is likely that Montana's injury will be redressed by a favorable decision.

Montana's injury would be redressed by a favorable decision. As discussed above, Montana adopted Federal Appellants' argument with respect to the Great Lakes Wolf decision, and this Court has jurisdiction to hear Federal Appellant's arguments with respect to whether FWS need perform a status review of the listed entity and whether the GYE grizzly bears are threatened by genetic factors. Therefore, to the extent the Court decides these issues, Montana's injury is potentially redressable. Montana also appealed the District Court's Order requiring a comprehensive species status review and its determination that existing post-delisting regulatory mechanisms are inadequate to protect the GYE grizzly. Overturning the District's Court's Order on these issues would also redress Montana's injury. Moreover, other Appellant Intervenors have challenged the entirety of the District Court's Order, including remand and vacatur. Thus, a decision in favor of these Appellant Intervenors would also redress Montana's injury.

III. The Lack of a Mandatory Recalibration Provision is not Fatal to the 2017 Final Rule.

In their Opening Brief, Plaintiff Appellees Humane Society of the United States and The Fund For Animals argue that FWS unlawfully finalized delisting without a mandatory recalibration provision. *See* Doc. 94 at 13, supra. As Montana

demonstrated in its Opening Brief, it was not necessary that the 2017 Final Rule or Conservation Strategy contain a mandatory recalibration provision, *see* Doc. 56 at 17-22, and Plaintiff Appellees' briefing adduces nothing to countermand that conclusion.

IV. FWS's Determination That It Need Not Require Translocation of Bears from Outside the Yellowstone Population was Reasonable and Consistent with the Best Scientific Data Available.

Montana also stands on its argument in its opening brief that FWS's determination that it need not require translocation of bears from outside the GYE was reasonable and consistent with the best scientific data available. *See* Doc. 56 at 23-33. In addition, Montana adopts and incorporates Federal Appellants' argument with respect to FWS's conclusion that the GYE grizzly bears are not threatened by genetic factors. *See* Doc. 124 at 10-23.

CONCLUSION

For the foregoing reasons, this Court has jurisdiction to hear Montana's appeal and the judgment of the District Court should be reversed with respect to its holdings discussed herein.

Respectfully submitted October 18, 2019.

s/ William A. Schenk

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **Appellants State of Montana and Montana Department of Fish, Wildlife and Parks' Reply Brief** with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 18, 2019.

I certify that I served the foregoing brief on this date by mail, postage prepaid, to the following unregistered case participants:

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