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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants-Appellants,

and

SAFARI CLUB INTERNATIONAL and the NATIONAL RIFLE ASSOCIATION OF AMERICA, *et al.*
Intervenors-Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
No. 17-89, 17-117, 17-118, 17-119, 17-123, 18-16 (DLC)
Honorable Dana L. Christensen

RESPONSE AND REPLY BRIEF OF INTERVENORS-DEFENDANTS-APPELLANTS SAFARI CLUB INTERNATIONAL AND THE NATIONAL RIFLE ASSOCIATION OF AMERICA

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GLOSSARY

Aland	Cross-Appellant Robert H. Aland
AWR	Appellees Alliance for the Wild Rockies, *et al.*
Chao2	The population estimator currently used to estimate grizzly bear populations
DMA	Demographic Monitoring Area
DPS	Distinct Population Segment
ESA	Endangered Species Act
Fed. E.R.	Federal Appellants' Excerpts of Record
1975 Final Rule	Amendment Listing the Grizzly Bear of the 48 Conterminous States as a Threatened Species, 40 Fed. Reg. 31734 (July 28, 1975)
2017 Final Rule	Final Rule Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife, 82 Fed. Reg. 30502-01 (June 30, 2017)
FWS	U.S. Fish and Wildlife Service
GYE	Greater Yellowstone Ecosystem
GYE DPS or GYE grizzly bear DPS	Greater Yellowstone Ecosystem Distinct Population Segment of grizzly bears
HSUS	Appellees Humane Society of the United States, *et al.*
ID E.R.	Idaho's Excerpts of Record
NCT	Appellees Northern Cheyenne Tribe, *et al.*
NRA	The National Rifle Association of America
Safari Club	Safari Club International
SCI/NRA	Safari Club International and the National Rifle Association of America collectively

SCI/NRA E.R.	Safari Club International and the National Rifle Association of America's Excerpts of Record
SCI/NRA Supp. E.R.	Safari Club International and the National Rifle Association of America's Further Excerpts of Record
WEG	Appellee WildEarth Guardians

STATEMENT REGARDING ADDENDUM

Relevant statutes, regulations, and other authorities cited in this brief are contained in the addenda filed with Safari Club International and the National Rifle Association of America's opening brief and the State of Wyoming's response and reply brief.

SUMMARY OF THE ARGUMENT

This Court has appellate jurisdiction. Defendants-Intervenors-Appellants Safari Club International and the National Rifle Association of America ("SCI/NRA") have standing to pursue this appeal. Plaintiffs-Appellees' challenges to the finality of the district court's ruling and SCI/NRA's standing are meritless.

The U.S. Fish and Wildlife Service ("FWS") is not required to conduct a comprehensive review of the so-called remnant populations before it can delist the Greater Yellowstone Ecosystem Distinct Population Segment of grizzly bears ("GYE grizzly bear DPS"). The FWS is also not required to analyze the functional impact of the delisting, and the FWS fulfilled any requirement to analyze the legal impact of the delisting, if one is required. Not only did the FWS fulfill the Endangered Species Act's ("ESA") requirements when it delisted the GYE grizzly bear DPS, it also complied with the FWS's longstanding population-by-population grizzly bear recovery and delisting approach.

The regulatory mechanisms in effect at the time of the delisting were adequate. Both the Chao2 population estimator used to estimate the GYE grizzly bear population and the lack of a commitment to recalibrate if a new population estimator is adopted are adequate and do not weaken the reasonableness of the FWS's rationale.

Finally, Cross-Appellant Aland's arguments are meritless. In particular, Mr. Aland's assertions that the peer reviewers had conflicts of interest are baseless, and the Court should reject those allegations.

ARGUMENT

A. This Court has appellate jurisdiction.

The Appellees begin their briefing by challenging this Court's jurisdiction. They contend that the district court's judgment is not a "final" order, the FWS lacks standing to appeal, and the Defendant-Intervenor-Appellants cannot establish independent standing. These arguments fail as matters of both fact and law.

First, the district court's judgment is final under this Court's practice and the "considerations" in *Pit River Tribe v. U.S. Forest Service*, 615 F.3d 1069 (9th Cir. 2010) ("*Pit River Tribe 2010*") and *Alsea Valley Alliance v. Dep't of Commerce*, 358 F.3d 1181 (9th Cir. 2004). Second, the FWS has standing to seek reversal or alteration of the scope of the district court's remand. And third, SCI/NRA have demonstrated their own standing to appeal the district court's erroneous

conclusions. Thus, the Appellees' jurisdictional objections should be rejected, and this Court should proceed to review the merits of this appeal.

i. This Court has jurisdiction over the district court's final order.

The district court's judgment is a final, appealable order under 28 U.S.C. § 1291. Appellee WildEarth Guardians ("WEG Appellee") asserts that remand orders "are generally not 'final' decisions." Dkt. 91, WEG Br. at 38-39 (citing *Pit River Tribe 2010*, 615 F.3d at 1075-76; *Alsea Valley All.*, 358 F.3d at 1185). According to WEG Appellee, "it makes no sense for this Court to exercise jurisdiction to resolve a matter that is already being reviewed by the agency and *may* not be final." *Id.* at 38 (emphasis added). The word "may" is telling. Unlike the cases cited by WEG Appellee, the Federal Appellants *have* appealed the district court's ruling. This is not a situation like *Alsea Valley Alliance* where the federal agency fully accepted a remand and even went so far as to initiate a "four-step action plan" to incorporate the district court's rationale. 358 F.3d at 1183-84. To the contrary, the Federal Appellants have appealed most of the district court's holdings. *See* Dkt. 116; Dkt. 124. Accordingly, this case falls under the exception permitting review of a remanded order "where the agency will otherwise be effectively foreclosed from appealing post-remand." *Pit River Tribe 2010*, 615 F.3d at 1076; *see also Pit River Tribe v. Bureau of Land Mgmt.*, --- F.3d ---, 2019 WL 4508340, *2 (9th Cir. Sept. 19, 2019) (finding this Court had jurisdiction

despite remand to Bureau of Land Management ("BLM"), "because after remand to the agency, BLM cannot later appeal the result of its own agency decision") ("*Pit River Tribe 2019*").

This case also falls under an exception for an appeal in cases involving a non-governmental intervenor. Under this exception, 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." *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1175 (9th Cir. 2011) (internal quotation and citation omitted). Because "the requirement of finality is to be given a practical rather than a technical construction," these three prongs "are not strict prerequisites, but merely considerations." *Id.* at 1175-76 (internal quotation and citation omitted). All three are not required for a remand order to be "final." *Id.* at 1176; *see also Skagit Cty. Pub. Hosp. Dist. No. 2 v. Shalala*, 80 F.3d 379, 384 (9th Cir. 1996).

Applying the first consideration, this Court has found a district court's order final when it fully resolves the questions at issue on appeal. *See United States v. U.S. Bd. of Water Comm'rs*, 893 F.3d 578, 594 (9th Cir. 2018). SCI/NRA and the other Appellants challenge at least three separable questions that the district court fully addressed in its order. *Compare* Dkt. 74, SCI/NRA Br., *with* Fed. E.R. 2-49.

This consideration illustrates the "practical finality" of the district court's order. *See Sierra Forest Legacy*, 646 F.3d at 1176.

The second consideration is met when a remand "may result in a wasted proceeding" because the district court's order forces the agency to apply a potentially incorrect interpretation of governing law, *Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir. 1990), or requires "adherence to rules" that appellants "continue to challenge," *Sierra Forest Legacy*, 646 F.3d at 1176.[1] Here, the district court's order imposes erroneous legal standards that the FWS is appealing, while also requiring that the FWS adhere to a specific recalibration commitment that SCI/NRA (and other Appellants) continue to challenge. Thus, this consideration weighs heavily towards the judgment being "final" because these issues will undoubtedly come up in subsequent litigation, resulting in a "wasted" remand. *See Pit River Tribe 2019*, 2019 WL 4508340, at *3 (finding remand order "final" because the district court's potentially erroneous holdings would "constrain[ ]" the BLM on remand and potentially "result in a wasted proceeding").

[1] A district court order is also considered final where, as here, state agencies "would be compelled" to apply a potentially erroneous district court ruling that would have wide-ranging effects. *See U.S. Bd. of Water Comm'rs*, 893 F.3d at 594-95 (holding district court order remanding analyses to California and Nevada agencies was final). SCI/NRA join and agree with the arguments on this point in the States' reply briefs. Dkt. 132, 20-24; Dkt. 134, 9-13; Dkt. 135, 16-18.

Third, a remand order is considered final "where the relief sought by appellants cannot possibly be achieved through the district court's directions," increasing the importance of an immediate appeal. *See Sierra Forest Legacy*, 646 F.3d at 1174. In *Sierra Forest Legacy*, the appellant could never achieve its requested relief because, on remand, the agency continued to apply the same framework the appellant challenged without "detailed analysis" of the appellant's concerns. *Id.* at 1175-76. On the other hand, in *Pit River Tribe 2010*, this consideration did not suggest that the order was "practically" final because the appellant tribe could participate in mandatory consultation with the agency as part of a new environmental-impact analysis and thereby obtain its desired relief. 615 F.3d at 1072-73.

Here, SCI/NRA's requested relief cannot possibly be achieved through the district court's remand. As a practical matter, the FWS accepted remand on the issue of recalibration. Dkt. 116, Fed. Br. at 9-10. These partial revisions to the 2017 Final Rule will not provide SCI/NRA with their requested relief because they will only address one of three issues that SCI/NRA challenge in the district court's judgment. *See also* Dkt. 124, Fed. Reply at 14-18; Dkt. 134, Mont. Reply at 9-12. Remand of all three issues pursuant to the district court's mistaken reasoning also fails to provide SCI/NRA with their requested relief. SCI/NRA intervened to defend the 2017 Final Rule. However, the district court's remand forces the FWS

make changes to its reasoning in the 2017 Final Rule that are unnecessary and out-of-touch with the ESA. If this Court fails to review the district court's erroneous holdings, the holdings will set the standard for what the FWS must consider and how the FWS must evaluate the best available science with respect to the GYE DPS, and potentially set a standard for what the FWS will determine it must consider in delisting not only for the GYE DPS, but for all distinct population segments. As in *Sierra Forest Legacy*, SCI/NRA's disagreement with the requirements imposed by the district court on delistings will never be addressed. Further litigation will be inevitable to challenge the district court's mistaken application of the ESA, in this case and future delistings. Unlike in *Pit River Tribe 2010*, no mandatory consultation is ordered; the opportunity to address the district court's incorrect reasoning will be foreclosed absent this appeal. Accordingly, all three considerations demonstrate that the district court's judgment is a "final" order.

ii. The FWS has standing to appeal the district court's erroneous holdings.

In the second jurisdictional challenge, Appellees WildEarth Guardians, Alliance for Wild Rockies *et al.*, and Crow Tribe contend that the FWS does not have standing to appeal because it did not challenge the remand of the 2017 Final Rule. Dkt. 91, WEG Br. at 36-38; Dkt. 93, AWR Br. at 15-20; Dkt. 96, Crow Tribe Br. at 12-14. These Appellees rely on *NRDC v. Gutierrez*, 457 F.3d 904 (9th

Cir. 2006). SCI/NRA agree and join with the Federal Appellants' response demonstrating the FWS's standing and distinguishing *NRDC*. Fed. Reply at 15-17.

The *NRDC* case has never been applied to an agency remand or in any published opinion. The case is limited to a specific and unusual set of facts. In *NRDC*, the district court's "carefully tailored" order permanently enjoined the peacetime use of Low Frequency Active Sonar "in areas that are particularly rich in marine life, while still allowing the Navy to use this technology for testing and training in a variety of oceanic conditions." *NRDC v. Evans*, 279 F. Supp. 2d 1129, 1191 (N.D. Cal. 2003). The order did not remand any findings to the agency defendants. *See id.* at 1191-92. The order allowed the agencies to either revise their analyses and lift the injunction or to operate within its restrictions. *See* 457 F.3d at 906. On appeal the agency defendants did not challenge the injunction; they sought only reversal of the district court's ruling that a biological opinion violated the ESA. *Id.* Because the agency defendants did not "seek a reversal or a modification of the relief granted by the district court," and because "ruling [on the biological opinion] would have no practical effect unless defendants were to succeed in curing all other violations identified by the district court," this Court found that the agency defendants lacked standing to press their appeal. *Id.*

Unlike in *NRDC*, the FWS *is* seeking to reverse and modify the relief granted. The district court remanded the 2017 Final Rule for reconsideration of

three issues. The Federal Appellants challenge two of the three. Unlike in *NRDC*, where the court's ruling had "no practical effect," this Court's reversal of the district court's erroneous holdings will significantly reduce the scope of the remand and the FWS's timing and ability to issue a new GYE DPS rule. Because *NRDC* does not apply to the circumstances in this case, the ruling in *NRDC* is not controlling and the FWS has standing to appeal.

iii. SCI/NRA have independent standing to pursue this appeal.

Appellees Alliance for Wild Rockies *et al.* and Crow Tribe contend that the Intervenors' appeals should be dismissed for lack of standing. AWR Br. at 20-40; Crow Tribe Br. at 15-20. As they fully explained in their respective reply briefs, each State Appellant can show its independent standing for all three issues on appeal. Wyo. Reply, Dkt. 132 at 14-35; Mont. Reply at 13-18; Idaho Reply, Dkt. 135 at 10-18.

SCI/NRA agree and join with these arguments. As explained below, SCI/NRA also have standing to sustain this appeal.[2] Accordingly, this Court has

[2] Appellees Alliance for Wild Rockies *et al.* and Crow Tribe wrongly claim that the Appellants had to raise the issue of standing in their opening briefs. AWR Br. at 23; Crow Tribe Br. at 10-12. "[T]the jurisdictional issue of standing can be raised at any time." *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 708 (9th Cir. 2009). Further, this Court "may consider an issue not raised in the appellant's opening brief if it is raised in the appellee's brief." *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 999 (9th Cir. 2005); *see also Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527-28 (9th Cir. 1997) ("Because

jurisdiction because at least one of the Appellants has standing. *See, e.g.*, *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943-44 (9th Cir. 2011) (en banc).

An intervenor-defendant may pursue an appeal "in the absence of the party on whose side intervention was permitted . . . upon a showing by the intervenor that he fulfills the requirements of Art. III. To establish Article III standing, a party must demonstrate 'injury in fact,' causation, and redressability." *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 963 (9th Cir. 2015) (citations omitted); *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 482 (9th Cir. 2011). Organizations like SCI/NRA have standing to represent the interests of their members when "[1] [their] members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization[s'] purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *W. Watersheds Project*, 632 F.3d at 482-83 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181 (2000)).

An intervenor-appellant meets the "injury in fact" requirement by showing that its "interests have been adversely affected by the judgment." *Didrickson v.*

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standing was not at issue in earlier proceedings, we hold that petitioners in this case were entitled to establish standing anytime during the briefing phase.").

U.S. Dep't of the Interior, 982 F.2d 1332, 1338 (9th Cir. 1992); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1398-99 (9th Cir. 1995) (holding organization whose members lived in Idaho and visited area of snail habitat had standing to appeal the district court's vacatur of ESA listing rule). Causation and redressability are satisfied when an intervenor "could benefit from an appellate decision reversing the district court." *Didrickson*, 982 F.2d at 1339.

In *Didrickson*, intervenor organizations appealed the vacatur of a rule restricting the taking of sea otters by Alaska Natives after federal defendants withdrew from the appeal and "acquiesce[d]" in the judgment. 982 F.2d at 1335. The organizations demonstrated standing through affidavits of their members who lived in Alaska and observed and studied sea otters in specific areas. *See id.* at 1340-41. The organizations established an injury in fact based on the increased take of sea otters due to vacatur of the restrictions; that injury could be redressed by reversal of the district court's decision. *See id.*

As in *Didrickson*, SCI/NRA submitted declarations from members who live in or near the GYE. These members describe their experience hunting other species in the GYE and declare concrete intentions to hunt grizzly bears in the GYE once a season is opened. For example, SCI/NRA member Anthony Hafla, a resident of Idaho, attested that he has hunted deer, antelope, elk, and black bear in the GYE and would apply for a grizzly tag in specific GYE Game Management

Units in Idaho. SCI/NRA Supp. E.R. 12-13 ¶¶ 8-9 (also explaining that he "would prepare for the hunt by taking scouting trips" and would dedicate "at least three weeks [off work] to setup camp, conduct scouting trips, and hunt until my tag is filled").

Similarly, Safari Club member John Atcheson, a resident of Montana, affirmed that he has hunted numerous species in the GYE, has previously hunted grizzly bears, and will "make plans to hunt grizzlies again in Montana" by "tak[ing] a full season off and apply[ing] to hunt a grizzly bear" once the hunting is legal. SCI/NRA Supp. E.R. 1-2 ¶¶ 5-7; *see also* SCI/NRA Supp. E.R. 5 ¶¶ 7-10 (SCI/NRA member Thomas Lavelle describes his prior experience hunting in the GYE and states his intent to "apply for a tag and make plans to hunt a grizzly bear . . . If the opportunity presents itself, I would take whatever time I needed and pay whatever costs necessary to take advantage of a hunt."). And Safari Club member William Hoese, a resident of Wyoming, declared that if grizzly hunting is legal, he will "make definite plans to hunt grizzlies in the [GYE], likely out of Cody, Wyoming in the Sunlight Basin area. As I live in Wyoming, travel to Cody would not be difficult." SCI/NRA Supp. E.R. 10-11 ¶ 8; *see also id.* at ¶¶ 6-7 (describing prior experience hunting in the GYE and hunting grizzly bear).

SCI/NRA also submitted the declaration of Safari Club member Edwin Johnson, a resident of Montana who works as a hunting outfitter and guide on the

northwest boundary of Yellowstone National Park. SCI/NRA Supp. E.R. 7-8 ¶¶ 2-3, 6. Mr. Johnson "would welcome an opportunity to provide guided grizzly bear hunts for [his] clients," and the hunting "would be great for business." Mr. Johnson averred that he "would also personally hunt a grizzly if given an opportunity to do so." *Id.* at ¶ 8.

These declarations establish that SCI/NRA's members' interests have been adversely affected by the district court's judgment. The 2017 Final Rule removed the prohibition on take of the GYE grizzly bear DPS and permitted the States to implement regulated hunting as a bear management tool. Fed. E.R. 111-14, 168. Both Wyoming and Idaho scheduled grizzly bear hunting seasons while the 2017 Final Rule was in effect. Fed. E.R. 11. Vacatur of the 2017 Final Rule reinstated the ESA prohibition on take. Fed. E.R. 209; 50 C.F.R. § 17.40(b). The district court's judgment prevents the States from authorizing hunting seasons and taking other management actions for grizzly bears. Consequently, it injures SCI/NRA's members' interests in participating in grizzly bear hunting in the GYE. Reversal of the district court's erroneous holdings will redress these injuries and allow the States to resume their responsible management of the bears. This case presents a similar situation to *Didrickson* and, for similar reasons, SCI/NRA's members have standing. Because the interests at stake are germane to SCI/NRA's purposes as hunter advocacy and conservation organizations (SCI/NRA Supp. E.R. 14-15, 18.

(Goodenow Decl. ¶¶ 5-7; Cox Decl. ¶¶ 6-7)), and because the appeal does not require the participation of individual members, SCI/NRA have demonstrated their own standing to support this Court's jurisdiction. *W. Watersheds Project*, 632 F.3d at 483.

Appellees Alliance for Wild Rockies *et al.* object that "a purported inability to hunt grizzly bears" does not establish an injury in fact because the declarants did not attest that they had 2018 hunting permits.[3] AWR Br. at 32-35. These Appellees seek to impose a higher burden on hunting organizations than what the law requires. Standing imposes "relatively modest requirements." *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1169 (9th Cir. 2011) (internal quotation and citation omitted). An organization's members can demonstrate an injury in fact through a geographical nexus and a "credible allegation of desired future use." *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1149 (9th Cir. 2000) (citing *Friends of the Earth*, 528 U.S. at 181-84); *see also Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 705, 707-08 (9th Cir. 2009) (finding declaration stating that plaintiffs viewed polar bears in

[3] This argument was directed to declarations submitted with Appellant Sportsmen's Alliance Foundation's opening brief and is not applicable to the statements in SCI/NRA's declarations (including those by Mr. Johnson, who would not need a hunting license himself to guide a grizzly bear hunt). In an abundance of caution, SCI/NRA refute the incorrect legal standard on which the Appellees rely.

affected region and had plans to do so again in the future had standing to challenge FWS regulation).[4] SCI/NRA's declarations reflect a geographic nexus to the GYE and concrete intentions to hunt grizzly bears as soon as feasible, including the intention to engage in the required planning and logistics. SCI/NRA Supp. E.R. 1-13. Those averments are enough for standing. Based on similar declarations, courts routinely find that SCI/NRA have standing to defend government actions that will establish or preserve the opportunity to hunt. *See, e.g.*, *Pub. Emps. for Envtl. Responsibility v. Bernhardt*, No. 18-CV-1547-JCB, slip op. at 3-4 (D.D.C. Mar. 22, 2019) (finding Safari Club had standing to intervene to defend delisting of Louisiana black bear based on declarations of Safari Club members stating their interest in participating in a future hunt once available; although Louisiana had not yet proposed to open a hunting season, "relisting of the Louisiana black bear on the threatened species list will serve as a complete bar on Safari Club's pursuit of its preferred conservation approach"); *Friends of Animals v. Jewell*, 82 F. Supp. 3d 265, 269-70 (D.D.C. 2015); *Humane Soc'y of the U.S. v. Jewell*, 76 F. Supp. 3d 69,

[4] In environmental cases, this Court has not required a plaintiff to have a permit in-hand to support an injury in fact. *See, e.g.*, *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1515 (9th Cir. 1992) (holding that plaintiffs had standing to challenge development of wilderness areas where they recreated even though development projects were subject to contingencies such as government approvals); *Pac. Legal Found. v. State Energy Res. Conservation & Dev. Comm'n*, 659 F.2d 903, 914-15 (9th Cir. 1981) (finding utility had standing even though it had to secure financing and comply with regulations before plant could be built).

75 & n.2 (D.D.C. 2014), *aff'd sub nom.*, *Humane Soc'y of the U.S. v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017); *NRA v. Potter*, 628 F. Supp. 903, 908 (D.D.C. 1986).

Accordingly, SCI/NRA have demonstrated their standing to appeal the district court's erroneous holdings which vacated the 2017 Final Rule and thereby served as a "complete bar" to SCI/NRA's "pursuit of [their] preferred conservation approach." Appellees' contrary arguments should be denied, and this Court should proceed to the merits.

B. The FWS sufficiently considered the impacts of delisting the GYE grizzly bear DPS on the remaining lower-48 bears.

In their opening brief, SCI/NRA explained that (1) the FWS is not required to consider the "functional effect" of the GYE grizzly bear DPS delisting on the remaining, listed grizzly populations, and (2) the FWS sufficiently considered the legal effect of the DPS delisting on the remaining, listed grizzly populations, should such a requirement exist. SCI/NRA Br. at 5-15. SCI/NRA also agreed with the Federal Appellants that a "comprehensive review" is not required. *Id*. at 5. In their briefing, Appellees Northern Cheyenne Tribe *et al.* ("NCT Appellees") concede that a comprehensive review is not required, but their arguments that an

analysis of the functional effect is required and that the FWS did not consider the legal impact of the DPS delisting are incorrect. NCT Br., Dkt. 92 at 33-44, 46-49.[5]

i. NCT Appellees' strained arguments in support of a functional impact analysis are groundless.

NCT Appellees seem to acknowledge that in *Humane Society of the U.S. v. Zinke*, the D.C. Circuit held that, when delisting a DPS, only a determination whether the remnant population still qualifies as a listable species is required. But NCT Appellees nevertheless cling to the word "functional" used in the district court's opinion as requiring something more than that "legal" analysis. *Compare* NCT Br. at 32 (citing *Humane Soc'y*, 865 F.3d at 602), *and id.* at 35 (citing *Humane Soc'y*, 865 F.3d at 600), *with id.* at 35 n.3. NCT Appellees also misconstrue one element of SCI/NRA's argument as an attempt to distinguish the *Humane Society* holding from the present case. *Id.* at 45. Finally, NCT Appellees attempt to justify the district court's erroneous reliance on Section 4(c)(2) of the ESA. *Id.* at 45-46. NCT Appellees are wrong on all accounts.

The word "functional" was erroneously included in the district court's decision below. The court never explained what a "functional" analysis would

[5] Federal Appellants and the State Appellants addressed much of NCT Appellees' arguments related to these issues in their response and reply briefs. Fed. Reply at 23-28; Wyo. Reply at 43-47; Idaho Reply at 19-25. SCI/NRA largely agree with those responses and adopt them; however, SCI/NRA continue to disagree with Federal Appellants' acceptance of the district court's remand regarding the need for new legal and functional analyses. *See* SCI/NRA Br. at 5.

entail, aside from one reference implying that it possibly considered "functional" to be equivalent to "biological" or something similar. *See* SCI/NRA Br. at 6. Although NCT Appellees attempt to describe the kind of functional analysis that the district court presumably intended to mandate, Federal Appellants correctly explained that NCT Appellees conflate their argument with the issue of comprehensive review. Fed. Reply at 26; *see also* NCT Br. at 35 n.3 (alleging that the review of functional impact should "encompass 'all identified and reasonably identifiable threats'") (citing Fed. E.R. 30). Nothing in the ESA, the holding in *Humane Society*, or the FWS's interpretation of the ESA require that the FWS conduct an analysis of the functional effects of a DPS delisting on the remaining listed populations. The Court should reject this unfounded requirement.

Contrary to NCT Appellees' argument, SCI/NRA's discussion regarding the factual circumstances of the wolf DPS delisting at issue in *Humane Society* was not an attempt to distinguish *Humane Society* from this case.[6] Rather, SCI/NRA's discussion clarified the D.C. Circuit's holding and showed that the district court misconstrued *Humane Society* to require something that it did not. As SCI/NRA explained, when read as a whole the relevant portion of *Humane Society* held only that the FWS must consider "the legal status" of the remnant population and ensure

[6] Notably, the factual differences between *Humane Society* and this case are significant and important to the Court's determination. *See, e.g.*, SCI/NRA Br. at 11.

that the DPS delisting does not create an "orphan to the law." SCI/NRA Br. at 7-8. By laying out the facts of *Humane Society*, SCI/NRA further explained why the D.C. Circuit was particularly concerned about the legal (listing) status of the remnant wolves in that case. In particular, the FWS had already concluded that the remnant wolves did not constitute a species and thus proposed to delist them. *Humane Soc'y*, 865 F.3d at 602 (citing 78 Fed. Reg. 35,664, 35,668 (June 13, 2013)). Thus, the D.C. Circuit held that the FWS's "backdoor route to the *de facto* delisting" of the remnant population was arbitrary and capricious. *Id*. at 602-03. The D.C. Circuit did *not* hold that a functional-impact analysis was required. In fact, the word "functional" does not appear in the opinion.

Additionally, nothing in the ESA requires the FWS to conduct a functional-impact analysis. In their opening brief, SCI/NRA explained that both the D.C. Circuit and the Montana district court erroneously relied on language in ESA Section 4(c)(2)(A), which applies only when the FWS conducts five-year status reviews of listed species, to hold that the FWS's review must cover the entire lower-48 population as previously listed, and not just the DPS considered for delisting. SCI/NRA Br. at 9-10. NCT Appellees dismiss the district court's reliance on Section 4(c)(2) as the court "canvassing Section 4's requirements." NCT Br. at 47. NCT Appellees are wrong. The D.C. Circuit's reliance on the language found only in Section 4(c)(2)(A) was foundational to its holding, and the

district court repeated this error. Both courts found the language within 4(c)(2)(A)—"species included in a list"—as indicative that the FWS must review the status of the species "as listed." *Humane Soc'y*, 865 F.3d at 601; Fed. E.R. 29. Without that language, the D.C. Circuit's and district court's holdings have no statutory basis. NCT Appellees are correct that the district court also cited other statutory provisions within ESA Section 4, but none of those provisions provide the language on which the courts relied. Neither Section 4(c)(1) nor Section 4(b)(1)(A) indicate that the FWS must review "species" as they are currently "included in a list" under the ESA (i.e., as an entire lower-48 population rather than a DPS). *See* 16 U.S.C. § 1533(c)(1), (b)(1)(A). NCT Appellees do not, because they cannot, rebut SCI/NRA's argument that the district court's interpretation of ESA Section 4 was incorrect. The court's opinion and the plain language of the ESA speak for themselves.

In total, this Court should reverse the district court's decision below—it should overturn the expansion of the scope of the *Humane Society* holding and the creation of requirements not found in the text of the ESA.

ii. If a legal impact analysis is required, the FWS has met that requirement.

SCI/NRA agree with Idaho that the D.C. Circuit and the district court misapplied the statutory provisions of the ESA and that no legal impact analysis is required for the remnant population when the FWS delists a DPS. Idaho Reply at

21-25; *see also supra* at 19-20; SCI/NRA Br. at 8-10. Nevertheless, if this Court finds that a legal impact analysis is required under these circumstances, the FWS has met that requirement.

As SCI/NRA explained in their opening brief, the recovery and delisting of individual populations of grizzly bears within the larger lower-48 population has been part of the FWS's recovery planning since the bears were listed. SCI/NRA Br. at 13-15. Sticking with that plan, the FWS delisted the GYE grizzly bear DPS after it recovered. In so doing, the FWS explicitly recognized that the delisting does not change the threatened status of the remaining grizzly bears in the lower-48 states. SCI/NRA Br. at 11-13. The FWS stated that conclusion multiple times throughout the 2017 Final Rule delisting the GYE grizzly bear DPS. *See* SCI/NRA Br. at 11-12. This is not a situation in which the DPS delisting sidesteps the delisting process with a backdoor route to a *de facto* delisting of the remnant population. NCT Br. at 28 (citing *Humane Soc'y*, 865 F.3d at 601-02). Rather, the FWS made clear in the 2017 Final Rule that the remnant populations would remain listed. Again, NCT Appellees provide nothing that rebuts SCI/NRA's argument or the FWS's determination in the 2017 Final Rule.

This Court should hold that the ESA does not require a legal impact analysis on the remnant population when a DPS is delisted, or in the alternative, that the FWS satisfied such a requirement in the 2017 Final Rule.

C. The FWS's actions do not conflict with the 1975 Final Rule or grizzly bear recovery plans.

The FWS's successful recovery and delisting of the GYE grizzly bear DPS are consistent with the 1975 Final Rule and the recovery plans. Contrary to WEG Appellee's allegations, neither the 1975 Final Rule nor subsequent grizzly bear recovery plans contradict the FWS's population-by-population approach to grizzly bear recovery. *See* WEG Br. at 60-62 (citing 1975 Final Rule, Fed. E.R. 441-43; 1982 recovery plan, JSER 1 (excerpts); and 1993 recovery plan, JSER 25 (excerpts)). WEG Appellee attempts to read into the rule an all-or-nothing delisting requirement that does not exist.

Nothing in the 1975 Final Rule creates an obligation that the FWS must recover all lower-48 grizzly bear populations, or even multiple populations, before delisting the GYE DPS. WEG Appellee wrongly asserts that the 1975 Final Rule requires that healthy populations "remain threatened but subject to regulatory modifications . . . ," instead of allowing population-by-population delistings. WEG Br. at 62. WEG Appellee misinterprets the 1975 Final Rule. As shown in the record, the FWS determined that if circumstances in the GYE became such that some bears needed to be hunted to alleviate population pressures, the FWS would consider modifying the grizzly bear regulation to allow for a hunt, as was the case for the Bob Marshall bears. Fed. E.R. 442. The FWS believed a regulated hunt to alleviate population pressures was one of the conservation tools on which it could

rely to conserve the species. *See* 16 U.S.C. § 1532(3). In the 1975 Final Rule, the FWS simply stated that it would consider using that conservation method if circumstances warranted it. The rule did not suggest that a grizzly bear population or DPS must remain listed under the ESA after it is fully recovered.

As SCI/NRA explained in their opening brief, the 1982 grizzly bear recovery plan likewise does not mandate an all-or-nothing delisting approach. SCI/NRA Br. at 14-15. Nevertheless, WEG Appellee attempts to refute SCI/NRA's argument with selective quotation from the plan. WEG Br. at 61 n.8. A full reading of the plan reveals the errors in WEG Appellee's interpretation. The plan explains that one of the recovery objectives for the entire lower 48 was to recover at least three "distinct grizzly bear ecosystems in order to delist the species in the conterminous 48 states." SCI/NRA E.R. 2. When explaining GYE-specific criteria, the plan stated that "[t]he population will be judged recovered (*eligible for delisting*) when it is determined to be viable at [a certain population size]." SCI/NRA E.R. 3 (emphasis added). Thus, the 1982 recovery plan contemplated a population-by-population delisting approach.

Subsequent to the 1982 recovery plan, the FWS has revised and supplemented the grizzly bear recovery plan several times and cemented its intent to delist the grizzly bears population-by-population. WEG Appellee concedes that the 1993 recovery plan (also) adopted a population-by-population delisting

approach. WEG Br. at 61 n.8; *see also* SCI/NRA Br. at 14-15 (further discussing the 1993 recovery plan).

The FWS's approach all along has been to recover individual populations, such that each population could be delisted independently. In the original 1982 recovery plan, when three of those populations were recovered and delisted, then the entire lower-48 listing would be deemed ready for delisting. This determination does not prevent the delisting of a DPS leading up to a potential removal of the entire lower-48 from the ESA list of threatened species. The FWS's attempt to delist the GYE grizzly bear DPS independent of the remaining listed bear populations does not contradict the 1975 Final Rule or the recovery plans, and WEG Appellee's contrary argument should be rejected.

D. The GYE grizzly bear DPS is not threatened by the lack of a commitment to recalibrate if a new population estimator is adopted.

The best available scientific and commercial data do not indicate that the GYE grizzly bear DPS is threatened with endangerment due to inadequate regulatory mechanisms, i.e., the lack of a commitment to recalibrate if a new population estimator is chosen. The Appellees' arguments should be rejected, and the district court's erroneous holdings should be reversed.

In their opening brief, SCI/NRA thoroughly explained why the district court erred in finding the 2017 Final Rule was arbitrary and capricious because it did not

have a commitment to recalibrate,[7] if and when a new population estimator is ever chosen. SCI/NRA Br. at 16-25. Simply put, the recovery criteria contain a failsafe: Demographic Recovery Criterion 1 states that the grizzly bears are recovered when they "[m]aintain a minimum population of 500 grizzly bears and at least 48 females with cubs-of-the-year" in the demographic monitoring area ("DMA"). Fed. E.R. 95. Those numbers can be calculated by any estimator "established in published, peer-reviewed scientific literature." *Id*. Thus, the GYE DPS's recovery is not based on Chao2's underestimation. Moreover, the 2017 Final Rule clarifies that the FWS will "initiate formal status review if the total population estimate is less than 500 inside the DMA in any year *or* if counts of females with cubs-of-the-year fall below 48 for three consecutive years. *Id*. at 95, 135 (emphasis added). That provision will ensure that the bears remain recovered under Recovery Criterion 1, or else they will be relisted. Thus, switching from Chao2 to another estimator will not undermine Demographic Recovery Criterion 1.

And even more importantly, the States are committed to maintaining a minimum of 600 bears, which will ensure that the population stays above 500 and remain recovered. Fed. E.R. 173. Despite the States' commitment, the Appellees disagree and argue that a commitment to recalibrate is required. But they have not

[7] Recalibration means "the mechanism by which estimates generated by a new population estimator, if adopted, would be brought in line with those generated by the current estimator." Fed. E.R. 32.

shown how the GYE grizzly bear DPS is threatened with endangerment without such a commitment.

Appellees Humane Society of the U.S. *et al.* ("HSUS Appellees"), who briefed the issue for all Appellees, like the district court below, rely on several conclusory statements from FWS employees who disagreed with the decision to drop the recalibration requirement. Dkt. 94, HSUS Br. at 13-45. According to HSUS Appellees, these statements prove that the FWS failed to apply the ESA's best-available-scientific-and-commercial-data standard. *Id*. at 22.

But as Wyoming correctly pointed out, statements by individual employees do not supplant the agency's final decision. Wyo. Reply at 36 (citing *Alfa Int'l Seafood v. Ross*, 264 F. Supp. 3d 23, 53 (D.D.C. 2017)); *see also Ctr. for Biological Diversity v. Nat'l Marine Fisheries Serv.*, 977 F. Supp. 2d 55, 75 (D.P.R. 2013) (citing *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658–59 (2007)).

Moreover, "[a]n agency complies with the best available science standard so long as it does not ignore available studies, even if it disagrees with or discredits them." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 995 (9th Cir. 2014) (citing *Kern Cty. Farm Bureau v. Allen*, 450 F.3d 1072, 1081 (9th Cir. 2006)). The dissenting, conclusory opinions on which HSUS Appellees rely—'"Can drive a truck through this!"; '"It is obvious what the states plan is"'; and '"a

major sellout of the science details necessary to assure conservation"'; HSUS Br. at 24—can hardly be considered "studies." But even assuming that these poorly-punctuated asides can qualify as "studies," they were not ignored. Then-director of the FWS Dan Ashe explained why locking-in the Chao2 estimator was an "advantage" to requiring recalibration. ID E.R. 48. Director Ashe's view should be afforded the most weight because he was the final decision-maker. 16 U.S.C. § 742b(b) (FWS operates under the Director's "supervision"). His opinion is reflected in the 2017 Final Rule and is therefore the final view of the agency. S*ee, e.g., Sierra Club, Inc. v. United States Fish & Wildlife Serv.*, 925 F.3d 1000, 1014 (9th Cir. 2019). There is "a rational connection between [the] facts" and Director Ashe's conclusion. *Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 920 (9th Cir. 2018) (internal quotation and citation omitted); *see also Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1036 (9th Cir. 2011) ("[T]he agency must explain why these laws and regulations constitute adequate regulatory mechanisms for grizzly protection.").

Not only does the record explain why the recalibration provision was removed from the 2017 Final Rule, the Rule itself also explained how the recalibration provision was "too prescriptive": it would require data from 2002-2014, the period from which the current population trends were measured, that likely were not collected, such as DNA samples that were too expensive to obtain.

Fed. E.R. 147. HSUS Appellees, nevertheless, attempt to argue that the FWS's explanation in the 2017 Final Rule does not rationally support the conclusion because the GYE grizzly bears "are 'the most studied bear population in the world."' HSUS Br. at 26-27 (citation omitted). Their attempt falls flat. These bears may be the most studied, but that does not mean the Interagency Grizzly Bear Study Team possesses *all* the data that future population estimators might require.

Finally, HSUS Appellees' contention that dropping the provision to recalibrate *could* leave the GYE grizzly bears less protected than they would be with it does not render the 2017 Final Rule arbitrary and capricious.[8] First, the ESA only requires the existing regulatory mechanisms to be adequate, i.e., "something less than the stalwart protections of the ESA, but considerably more than no special protection at all." *Greater Yellowstone Caol.*, 665 F.3d at 1032. And second, an agency "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, which the conscious change of course adequately indicates." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S.

[8] The emphasis is placed on the word "could" because then-Director Ashe believed that the bears would benefit from locking Chao2 in for the foreseeable future. ID E.R. 48.

502, 515 (2009). That is the case here. As explained above and in SCI/NRA's opening brief, regardless of what population estimator may be adopted in the future, the States have agreed to manage a minimum of 600 bears in the DMA. That is 100 more bears than the 500 required under Demographic Recovery Criterion 1, which this Court previously found to be sufficient. *Greater Yellowstone Coal.*, 665 F.3d at 1021. Furthermore, the FWS provided good reasons for why it believes that requiring recalibration would be "too prescriptive," Fed. E.R. 147, and that locking-in Chao2 for the foreseeable future would be beneficial to the bears, ID E.R. 48. Contrary to what HSUS Appellees argue, HSUS Br. at 44, the explanation for and the decision to drop the recalibration requirement was adequately explained; it is not arbitrary or capricious.

Accordingly, there are adequate regulatory mechanisms in place. The best available scientific and commercial data do not indicate that, based on a consideration of the adequacy of the existing regulatory mechanisms, the GYE grizzly bear DPS is threatened with endangerment. Appellees' arguments should be rejected, and the district court's erroneous holdings should be reversed.

E. The 2017 Final Rule provides a reasonable explanation for the FWS's conclusion that the GYE DPS is not threatened by genetic issues.

SCI/NRA stand by their argument that the 2017 Final Rule provides a reasoned explanation that lack of genetic diversity is not a threat to the GYE

grizzly bear DPS and in support of changing from a 2020 deadline to a genetic trigger for translocating bears. SCI/NRA Br. at 33-37. In addition, SCI/NRA agree with and join in the arguments in the Federal Appellants' reply on this point. Fed. Reply at 19-32. SCI/NRA also agree with and join in similar arguments made by Wyoming and Idaho in their reply briefs. Wyo. Reply at 59-61; Idaho Reply at 25-26. For the reasons presented in these briefs, this Court should reverse the district court's erroneous holding because the FWS adequately explained its reasoning and the district court erred in substituting its evaluation of the scientific evidence in place of the FWS's.

F. The Appellees' and Cross-Appellant Aland's remaining arguments are meritless.

SCI/NRA largely agree with and incorporate by reference Federal Appellants' responses to the other arguments raised by the Appellees and Mr. Aland on cross-appeal. Fed. Reply at 28-58. The Court should reject these meritless arguments.

i. Cross-Appellant Aland's allegations of conflicts of interest in the peer review process are baseless.

Rather than questioning the substance of the peer reviews, Mr. Aland attempts to discredit the credentials and impartiality of the reviewers. SCI/NRA specifically refute Mr. Aland's allegation that two of the individuals who reviewed the proposed delisting rule in the peer review process, Dr. Boyce and Dr. Etter, had

conflicts of interest due to their perceived association with Safari Club. Dkt. 101, Aland Br. at 21-22, 62. Neither of the reviewers work for Safari Club or are beholden to the organization in any way. Neither has ever received grant funding from Safari Club that would result in conflicts of interest as Mr. Aland asserts. AL-E.R. 437-61, 509-30.

Dr. Boyce and Dr. Etter have received funding for projects from dozens of sources, including individual Safari Club International chapters and the Safari Club International Foundation ("SCIF"), AL-E.R. 454-47, 525-26. Each of these entities is its own independent corporation with its own membership, bylaws, funding, conservation efforts, etc. Receiving grant funding from a Safari Club International chapter or from SCIF is not the equivalent of receiving money from Safari Club, and none of the chapters or SCIF are parties to this litigation.

Dr. Boyce's and Dr. Etter's curricula vitae disclose that they also have connections to organizations that do not support the GYE grizzly bear DPS delisting. *Id.* at 437-61, 509-30. For example, Dr. Boyce received funding from the American Society of Mammalogists. *Id.* at 454. Both biologists are members of that Society, and Dr. Boyce is a member of the Society for Conservation Biology. *Id.* at 457, 530. Notably, in his brief Mr. Aland cites a comment letter that both Societies co-wrote to the FWS in opposition to the GYE grizzly bear DPS delisting. Aland Br. at 25-26; *see also* AL-E.R. 588 (comment letter opposing the

delisting). Mr. Aland apparently ignores the fact that Dr. Boyce and Dr. Etter have connections to organizations on both sides of the delisting issue, presumably because it does not support his narrative.

Throughout their careers, wildlife biologists like Dr. Boyce, Dr. Etter, and the three other scientists who peer reviewed the 2017 Final Rule often work with many different organizations. The five peer reviewers collectively have 159 years of wildlife-biology experience, AL-E.R. 421, and have been published over 850 times, AL-E.R. 423-530. It is no surprise that they have connections to organizations that take a variety of positions about many issues. But their interactions with these organizations do not necessarily result in conflicts of interest such that the biologists—Dr. Boyce, Dr. Etter, or any others—would be unable to impartially and fairly participate in the FWS's peer review process. As Mr. Aland cites nothing in the record to suggest that any of the reviewers' impartiality was compromised or that any of the peer reviews were biased, his bald allegations lack merit, and this Court should reject them.

CONCLUSION

SCI/NRA request that the Court reject Appellees' arguments, reject Cross-Appellant Aland's arguments, reverse the district court's ruling in its entirety, and remand with instructions to reinstate the 2017 Final Rule.

DATED this 1st day of November 2019.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 1, 2019.

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

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