No. 18-36030

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.

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

OPENING BRIEF FOR INTERVERNOR-DEFENDANTS / APPELLANTS SPORTSMEN'S ALLIANCE FOUNDATION AND ROCKY MOUNTAIN ELK FOUNDATION

James H. Lister
BIRCH HORTON BITTNER & CHEROT, P.C.
1100 Connecticut Ave., N.W. Suite 825
Washington, D.C. 20036
Telephone: (202) 659-5800
Email: jlister@dc.bhb.com

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GLOSSARY OF TERMS

APA ..... Administrative Procedure Act

DMA ..... Demographic Monitoring Area

DPS ..... Distinct Population Segment

ESA ..... Endangered Species Act

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

GYE ..... Greater Yellowstone Ecosystem

RMEF ..... Rocky Mountain Elk Foundation

SAF ..... Sportsmen's Alliance Foundation

NCDE ..... Northern Continental Divide Ecosystem

INTRODUCTION

Appellant Defendant-Intervenors Sportsmen's Alliance Foundation ("SAF") and Rocky Mountain Elk Foundation ("RMEF") respectfully submit this opening brief in their appeal of the District Court's opinion and judgment (FWS E.R. 1 and 2-49) vacating the June 30, 2017 Final Rule issued by Defendant-Appellant U.S. Fish and Wildlife Service ("FWS") regarding the Greater Yellowstone Ecosystem ("GYE") population of grizzly bears, 82 Fed.Reg. 30502 (FWS E.R. 83-214).[1]

In that Final Rule ("GYE Grizzly Final Rule"), FWS recognized the GYE grizzly bear population as a distinct population segment ("DPS"), determined that the bears in the DPS were no longer in danger of extinction now or in the foreseeable future, and thus were not "endangered" or "threatened" under the Endangered Species Act ("ESA"), and so removed the DPS from the ESA's list of endangered and threatened species. See FWS E.R. 84, 126, and 214; see also 16 U.S.C. §§ 1531 (definitions of "endangered" and "threatened" and "species"), 1533 (statutory criteria for listing and delisting); 50 C.F.R. 17.11(h) (list of threatened species). FWS continued in effect the original 1975 listing of grizzly bears in the conterminous 48 States as "threatened" (40 Fed.Reg. 31734, July 28, 1975), except as modified by FWS's delisting of bears in the GYE DPS, the boundaries of which

[1] Citations to "FWS E.R. _" are to the Excerpts of Records filed by Appellant FWS (9th Cir. DE 46-1 through 46-3).

FWS defined by a series of highways surrounding lands surrounding Yellowstone National Park. FWS E.R. 214.[2]

Following the release of the GYE Grizzly Final Rule in June, 2017, FWS on December 7, 2017 (82 Fed.Reg. 57698) requested public comment on the impact on the Final Rule of an August, 2017 decision by the D.C. Circuit in a case involving wolves, *Humane* Society *v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017). After considering that public comment, FWS then published a Regulatory Review Determination, 83 Fed.Reg. 18,737 (Apr. 30, 2018), which was essentially an order on reconsideration. FWS in that decision adhered to its original decision in the Final Rule. *Id.*

In vacating the GYE Grizzly Final Rule, the District Court, as demonstrated in this brief, erred in finding arbitrary and capricious FWS's action recognizing a DPS within a pre-existing geographically broader ESA listing and delisting that DPS. FWS E.R. 23-32. The leading case precedent holds that FWS has the statutory authority to recognize and delist a DPS within a pre-existing broader listing. *Humane Society* , 865 F.3d at 600. That court invalidated the particular wolf DPS delisting before it for reasons that the District Court in the present case wrongly concluded also applied here. *Humane Society* , 865 F.3d at 602-03; FWS E.R. 23-

[2] Any bears that might in the future inhabit the now uninhabited Bitterroot Ecosystem, an area to the west of the GYE DPS, will be protected under the somewhat different ESA rules applicable to "experimental populations." See FWS E.R. 98, 214 (citing 65 Fed. Reg. 69624, Nov. 17, 2000).

32. The District Court here also made additional incorrect findings of error by FWS. *See* FWS E.R. 2-4.

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arose under a federal statute, the ESA, 16 U.S.C. § 1540(g), and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq*.

The District Court's judgment was final because it granted all of Plaintiffs' motions for summary judgment and vacated the rule under review. FWS E.R. 1, 48-49. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

The District Court entered judgment on October 23, 2018. FWS E.R. 1. SAF and RMEF filed a notice of appeal on December 13, 2018. FWS E.R. 71-75. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

The federal agency defendant, FWS, has appealed the District Court's rulings as to some but not all of the issues resolved by the District Court. *See* FWS Brief (9th Cir. DE 45) at 1-2. Under this Court's precedent, defendant-intervenors may appeal where the agency defendant does not appeal if the defendant-intervenors demonstrate the district court judgment they wish to appeal adversely impacts their interests. *Organized Village of Kake v. U.S. Dept. of Ag.*, 795 F.3d 956, 963 (9th Cir. en banc 2015). The appellant defendant-intervenor must show the Article III standing requirements of "injury in fact," causation, and redressability, and that "the

intervenor's interests have been adversely affected by the judgment." *Id.* (quoting *Didrickson v. U.S. Dep't of Interior*, 982 F.2d 1332, 1338 (9th Cir.1992)).

To the extent these requirements apply in a situation like this one in which the named agency defendant (FWS) has filed an appeal, but has limited that appeal to certain issues, SAF and RMEF satisfy these requirements. With their successful motion to intervene in the District Court (District Court DE 118), SAF and RMEF supplied declarations demonstrating the injury to their members' interests if the GYE Grizzly Final Rule was vacated by the District Court, which has now occurred.

More specifically, members of SAF and RMEF planned to participate in the hunting of grizzly bears, as well as other prey species such as elk (whose population levels can be impacted by the grizzly population level), and encourage active management of the wildlife populations. SAF/RMEF E.R. 3, 21 (Heusinkveld Decl. ¶¶ 2, 3; Holland Decl. ¶ 12).[3] These SAF and RMEF members, some of whom live and hunt in Montana, Wyoming, Idaho, and other states in the Greater Yellowstone region, frequently visit the area for the hunting purposes. See id. The District Court's judgment vacating the GYE Final Rule reinstated the ESA prohibition against "take" of grizzlies, preventing hunting plans by SAF and RMEF members. SAF/RMEF E.R. 6, 12, 14 (Heusinkveld Decl. ¶ 8; Denny Decl. ¶¶ 6, 12). The reinstatement of the "take" prohibition, will also put members' hunting dogs at risk,

[3] Record documents not in the FWS E.R. are supplied as the SAF/RMEF E.R.

because hunters pursuing other species may only neutralize a grizzly bear threat on their dog if the grizzly's attack is directed against the hunter personally, not the dog. SAF/RMEF E.R. 5, 14 (Heusinkveld Decl. ¶¶ 6, 7; Denny Decl. ¶¶ 10, 11); see 50 C.F.R. 17.21(c)(2) and 17.31(a) (self-defense exception to limited to defense of human life). Lastly, the inability for states to manage grizzly bear populations, including the options of hunting grizzly bears, could reduce the number of other grizzly bear prey species in the region (e.g. elk), injuring hunting, recreational, and other necessary wildlife management activities of SAF and RMEF. SAF/RMEF E.R. 25 (Brock Decl. ¶ 10). Each finding by the District Court holding that FWS erred in adopting the GYE DPS Final Rule has injured SAF and RMEF due to the District Court's vacatur of the Final Rule. FWS E.R. 2-3. This Court may redress these injuries to SAF/RMEF's members by reversing the District Court's findings of error and reinstating the GYE Grizzly Final Rule.

STATEMENT OF THE ISSUES AND ADOPTION OF OTHER APPELLANTS' BRIEFS ON SPECIFIC ISSUES

The District Court ruled against FWS on four issues in its opinion. FWS E.R. 2-49. The first two issues relate to possible impact on other grizzly bear populations of recognizing and delisting the GYE grizzly population, and the second two issues relate to the recovery status of the GYE grizzly population itself. SAF and RMEF in this brief address one of the four issues, and adopt the briefs of other Appellants on the other three issues, as follows:

1. Did FWS's order recognizing the GYE DPS and delisting it (a) constitute delisting of the original broader "lower 48" grizzly bear ESA listing by balkanization as the D.C. Circuit held occurred with respect to wolves in *Humane Society*, 865 F.3d at 603, or (b) have an unlawful substantial negative impact on the recovery prospects of other grizzly bear populations in the original "lower 48" grizzly bear listing?

- *SAF and RMEF address this issue in this brief.*

2. Does FWS have to conduct a comprehensive review of the conservation status of those populations of an ESA-listed species whose listing status is not being changed, when FWS recognizes as a DPS and delists a recovered population within the more broadly listed species? If "yes," what is the extent of that required comprehensive review?

- *SAF and RMEF adopt the discussion of this issue in Section I.C. of Appellant FWS's brief (9th Cir. DE 45, pp. 23-28).*

3. Is the population of the GYE DPS sufficiently large that FWS could reasonably conclude that the GYE grizzly bear population is no longer endangered or threatened as a result of genetic diversity factors?

- *SAF and RMEF adopt the discussion of this issue in Section II of FWS's brief (9th Cir. DE 45, pp. 28-37) and Section II of Appellant Montana's brief (9th Cir. DE 56, pp. 23-34).*

4. Is it necessary to "recalibrate" the population threshold that would trigger possible future ESA relisting if there is a change in the methodology used after delisting to count bears in the GYE population?

- *SAF and RMEF adopt the discussion of this issue in Section B of Appellant Idaho's brief (9th Cir. DE 63, pp. 19-29) and Section I of Appellant Wyoming's brief (9th Cir. DE 59, pp. 23-44).*

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the addendum at the end of Appellant FWS's opening brief. 9th Cir. DE 45.

STATEMENT OF THE CASE

SAF and RMEF adopt and incorporate Appellant FWS's statement of the case. 9th Cir. DE 45, pp. 3-13. When this Court considered a previous challenge to a prior FWS effort to delist the GYE grizzly bear population, it noted in 2011 that since delisting, "the Yellowstone grizzly population has rebounded, as scientists, conservationists and land managers have made unprecedented efforts to study the bear and to change those human attitudes and behaviors that unnecessarily threaten it." *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015, 1019 (9th Cir. 2011). The GYE grizzly bear population remains healthy and has recovered.

SAF and RMEF note that FWS found in the Final Rule that there are "more than 700 bears" in the GYE, "more than 900 bears" in the Northern Continental Divide

Ecosystem surrounding and including Glacier National Park ("NCDE"), "fewer than 20 bears" in the North Cascades population along the Canadian border, "approximately 88 bears" in the Selkirk population along the Canadian border, "approximately 48 bears" in the Cabinet-Yaak population along the Canadian border, and that the Bitterroot Ecosystem to the west of the GYE has suitable habitat but may not be presently populated with grizzly bears. FWS E.R. 90. Thus the smaller grizzly populations with countable observable populations are the distant Selkirk and Cabinet-Yaak populations, there is believed to be an even smaller presently unobservable population in the distant Northern Cascades population, there is some suitable unoccupied habitat in the somewhat less distant Bitterroot Ecosystem to the west of the GYE, and there are many grizzly bears in the less distant NCDE to the north of the GYE. *See id.; see also*, Regulatory Review Determination, 83 Fed. Reg. 18737, 18739 (Apr. 30, 2018) (citing map on FWS's website showing these populations and recovery areas). An important part of the post-delisting Conservation Strategy agreed to by Montana, Idaho, Wyoming, Tribes, and Federal Government land management agencies are rules, programs, and protocols designed to maximize the chance of migration (dispersal) among the GYE, NCDE, and Bitterroot Ecosystem. FWS E.R. 161 (see Argument Point I.C for further citations).

SUMMARY OF THE ARGUMENT

The District Court wrongly concluded that FWS had not considered the legal and functional effect of delisting the GYE grizzly bears on other grizzly bear populations when in fact FWS did reasonably consider and account for those effects.

STANDARD OF REVIEW

SAF and RMEF adopt FWS's discussion (DE 45, pp. 14-15). FWS describes the familiar highly deferential "arbitrary and capricious" standard of review to which courts must adhere when reviewing agency action. See 5 U.S.C. § 706(2)(A); *Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Automobile Insurance Co*., 463 U.S. 29, 43 (1982). This is the same standard the Ninth Circuit applied in 2011 when a previous FWS GYE grizzly bear delisting rulemaking was before this Court. *Greater Yellowstone Coalition*, 665 F.3d at 1024.

ARGUMENT

I. The District Court Erroneously Held that FWS Had Not Considered the Legal and Functional Impact of GYE Grizzly Delisting on the Other Populations of Grizzly Bears.

The District Court held that FWS did not "consider the legal and function effect of delisting a newly designated population segment [the GYE grizzly bear DPS] on the remaining members of the listed entity [the other grizzly populations in the original Lower 48 States grizzly bear listing]." FWS E.R. 31-32. However, as

shown below, FWS did in fact consider both the legal and functional effect of delisting the GYE DPS on the other populations (NCDE, Selkirk, Cabinet-Yaak, Northern Cascades) and unoccupied potentially suitable habitat (Bitterroot).

The source of the District Court's mistaken belief that FWS did not consider the legal and functional effects on other grizzly populations of recognizing and delisting the GYE DPS is apparent. The District Court misunderstood FWS's statement in the Final Rule that consideration of other populations was beyond the scope of the GYE grizzly rulemaking. FWS E.R. 25 (citing FWS statement in the Final Rule that "the management and potential status of other grizzly bear populations is outside the scope of [the] final rule," FWS E.R. 133).

As the "beyond-the-scope" statement in the Final Rule indicates, FWS did not evaluate for each of the other grizzly populations the five listing factors that FWS would have had to evaluate had it considered uplisting, downlisting, or delisting those other populations under the ESA: (1) habitat degradation, (2) overutilization, (3) disease or predation, (4) inadequacy of existing non-ESA regulatory mechanisms, and (5) other factors impacting continued existence. 16 U.S.C. § 1533(a)(1). Thus, for example, FWS did not zoom into the Cabinet-Yaak ecosystem along the Canada border hundreds of miles from the GYE and evaluate the specific diseases that might threaten the Cabinet-Yaak bears, or whether the local counties in that area have zoning regulations that recognize the importance of protecting

grizzly habitat. As FWS's opening brief persuasively explains, FWS did not have to do such detailed soup-to-nuts analysis for the other grizzly bear populations because FWS held they continued to be part of the original ESA listing and it was not changing their listing status. FWS Brief, 9th Cir. DE 45, pp. 23-28.

What the District Court missed was that, as shown below, FWS in the GYE Grizzly Final Rule and Regulatory Review Determination did consider the other populations to the extent that changes in the ESA listing status of the GYE grizzlies might impact the other populations. Thus, in stating that consideration of the other grizzly populations was beyond the scope of the GYE grizzly rulemaking, FWS did not suggest it was ignoring the other populations.

This Court should reverse and remand to the District Court to consider the discussion of legal and functional impact on other grizzly populations and uninhabited areas that FWS did provide but that the District Court did not evaluate, due to the District Court's misunderstanding of FWS's statements regarding the scope of the GYE grizzly rulemaking proceeding.[4]

[4] If FWS at that point determines to provide an even more thorough analysis of these niche issues, it would be free to move in the District Court for a voluntary remand so that it may conduct that analysis, without having to start from scratch in a brand new rulemaking. The last remand proceeding, following a full vacatur by the United States District Court for the District of Montana in 2009, took FWS nine years to complete, and resulted in the Final Rule under review here.

A. The District Court Misapplied the D.C. Circuit's *Humane Society* Ruling in the Western Great Lakes Wolf case.

As a preliminary step along the way to the District Court reaching its ultimate ruling that FWS failed to consider the legal and functional impact of delisting the GYE grizzlies on other grizzly populations within the original lower 48 grizzly listing, the District Court concluded that FWS's delisting of the GYE DPS, and FWS's announced potential future delisting of the even larger NCDE grizzly bear population, was "balkanization" of the original lower 48 grizzly ESA listing indistinguishable from the balkanization the D.C. Circuit found in the wolf case. FWS E.R. 23-26 (citing *Humane Society*, 865 F.3d at 601-03). Because FWS in the present GYE grizzly case determined to continue ESA protections for the smaller grizzly populations and presently uninhabited areas (and also, at least for the time being, for the large NCDE population), while FWS it the wolf case proposed to end all protections for all wolves in the original Lower 48 wolf listing, regardless of their recovery status, the two cases are fundamentally different and thus distinguishable. FWS E.R. 204-05, 214. The District Court's preliminary error in finding the two cases to be "indistinguishable" appears to have significantly colored its ultimate ruling that FWS failed to consider the impact of GYE grizzly delisting on other grizzly populations. *See* FWS E.R. 25-31.

In comparing this case to *Humane Society*, the District Court observed that, after the GYE grizzly delisting ordered by FWS, and after a potential future NCDE

grizzly delisting that FWS has not yet proposed but might soon propose, the only two large lower 48 grizzly populations would have been delisted, leaving only a small number of grizzly bears protected by the original lower 48 listing:

> If the Northern Continental Divide and Greater Yellowstone populations are both successfully delisted, the lower-48 grizzly listing will cover only two areas with fewer than 100 grizzlies [this must be the Selkirk and Cabinet-Yaak populations, which FWS estimates to collectively have 136 bears collectively], one area where grizzlies have not been affirmatively located in over twenty years [this must be the Northern Cascades population, estimated by FWS to have fewer than 20 bears], and a fourth area where grizzlies have not been seen since at least 1975 [apparently, the now uninhabited Bitterroot Ecosystem].

FWS E.R. 25-26 (bracketed information on each population is from the Final Rule, FWS E.R. 90). The District Court concluded that reduction in the total number of bears protected by the lower-48 grizzly listing would be the same "real time 'balkanization' criticized by the D.C. Circuit in *Humane Society*." FWS E.R. 16, 26.[5]

However, the D.C. Circuit in *Humane Society* criticized a series of FWS wolf actions very different from the FWS grizzly actions here. Specifically, the D.C. Circuit addressed a decision by FWS to seek delisting of the entire original Lower

[5] The D.C. Circuit's *Humane Society* opinion states: "The Service's power is to designate genuinely discrete population segments; it is not to delist an already-protected species by balkanization. The Service cannot circumvent the Endangered Species Act's explicit delisting standards by riving an existing listing into a recovered sub-group and a leftover group that becomes an **orphan to the law**. Such a statutory dodge is the essence of arbitrary-and-capricious and ill-reasoned agency action." 865 F.3d at 603 (emphasis added).

48 wolf listing, including small wolf populations, through a two-step process that the D.C. Circuit characterized as delisting by balkanization (not just balkanization, delisting by balkanization). *Humane Society*, 865 F.3d at 602-03. In step one of that process, FWS in 2011 recognized a regional population of recovered wolves as a DPS (the Western Great Lakes DPS) and delisted it. *Id.* (citing 76 Fed. Reg. 81666, 81678-79). That was the agency action directly under judicial review in Humane Society. Then, while that judicial review litigation was pending, FWS in 2013 took step two by issuing a proposed rule to delist all the remaining listed wolves in the original 1970s Lower 48 wolf listing on the technical grounds that the remaining listed wolves within that original listing (scattered wolves near the West Coast) did not qualify as either a species, sub-species, or DPS and so purportedly could not be listed under the ESA. *Id.* (citing 78 Fed. Reg. 35,664, 35,668). FWS never finalized that proposed rule, and withdrew it in 2019. Meanwhile, the D.C. Circuit in 2017 held in *Humane Society* that FWS was circumventing the listing and delisting provisions of the ESA by using a regional delisting of a recovered population as a lever to force a total delisting of all Lower 48 wolf populations, regardless of their recovery status. *Id.* The D.C. Circuit described FWS's two-step process as impermissible delisting by balkanization through the creation of an "orphan to the law" (the wolf population outside delisted DPSs) that FWS would not protect. *Id.*

By contrast, FWS here affirmatively declared that all small grizzly populations will remain ESA-protected after delisting of the GYE DPS, and FWS announced only one possible future additional delisting, the potential future delisting of the NCDE population, which is even larger than the GYE grizzly population. FWS E.R. 90, 204-205 ("When this rule becomes effective, all areas in the lower 48 States outside the [Greater Yellowstone Ecosystem segment] boundary will remain protected as threatened under the Act."); Regulatory Review, 83 Fed. Reg. at 18,739-41 ("The 1975 listing remains valid"). Unlike its actions regarding wolves, FWS has never announced any plans to delist the smaller grizzly populations (Selkirk, Cabinet-Yaak, Northern Cascades) or potential future populations (Bitterroot). FWS went further and affirmatively stated a "commitment" to continue its work under the ESA to "recover" all remaining grizzly populations (this would include the NCDE population, which has likely already recovered). FWS E.R. 205 ("we are committed to pursuing grizzly bear recovery in the five remaining recovery zones identified in the 1993 Grizzly Bear Recovery Plan"). FWS also addressed all other uninhabited (or inhabited) areas by continuing ESA protections for any grizzly bears that might be found anywhere in the lower 48 states outside the boundaries of the GYE DPS. FWS E.R. 127, 214. Finally, FWS has not issued a proposed rule to delist the large healthy NCDE population.

The District Court recognized some of these distinction between FWS's actions regarding grizzly bears and its actions regarding wolves, but then erred by ruling that there was no relevant distinction. FWS E.R. 23-25 ("*Humane Society v. Zinke* is not distinguishable"). Defendants had some measure of success on this issue in their advocacy to the District Court. No passage in the District Court's opinion agrees with the Plaintiffs' impending doom theory that the delisting of the GYE grizzly DPS would trigger a domino effect in which all remaining grizzly populations, including the smaller non-recovered populations, would soon be delisted on the ground of ineligibility for listing, despite lack of recovery. *See* FWS E.R. 24-25.[6] Rather, as the quotation above from its opinion indicates, the District Court appeared to assume that the smaller grizzly populations would remain ESA-protected even after future NCDE delisting. *Id.* (discussing the number of bears remaining ESA-protected after a hypothetical future NCDE delisting). The District Court did recognize that, in the wolf case, FWS did not promise future protections for smaller wolf populations. FWS E.R. 25-26. However, the District Court did not discuss the impact of FWS's "commitment" in this case to "recover" all of the grizzly populations, despite SAF and RMEF drawing that fact to the District Court's attention. Compare FWS E.R. 22-30 (District Court opinion) with FWS E.R. 205

[6] SAF and RMEF devoted much of their briefing in the District Court to rebutting Plaintiffs' claim that delisting the GYE grizzly DPS would trigger a legal domino effect rendering the smaller grizzly populations ineligible for ESA listing.

(GYE Grizzly Final Rule). The District Court did not address the emphasis the D.C. Circuit placed on the contrasting fact that FWS had affirmatively proposed to terminate ESA protections for all wolf populations in the lower 48 states, even the smaller wolf populations, by delisting the entire original lower 48 listing on technical grounds, regardless of recovery status. *See* Humane Society, 865 F.3d at 602-03.

The factual and legal distinctions between FWS decision-making for grizzly bears and FWS decision-making for wolves are profound. As shown above, FWS determined to protect grizzly bears where they are rare, and return them to State management where they are recovered. FWS E.R. 204-206. By contrast, FWS proposed to end all protections for all wolves in the original Lower 48 wolf listing, irrespective of the recovery status of wolf populations. Proposed Rule, 78 Fed. Reg. 35,664, 35,668. In unduly minimizing these distinctions, the District Court focused on comparing (1) the total number of bears being delisted by the GYE Grizzly Final Rule plus those that may be delisted in the future in a hypothetical NCDE Grizzly Final Rule with (2) the total number of bears in the smaller grizzly populations that would retain ESA protections. FWS E.R. 25-26. However, there is no quantitative requirement in the ESA that DPS delistings leave large numbers of the species under continuing ESA protection, outside the DPS but within the original ESA listing. FWS E.R. 24-25. No such requirement appears in the text of the ESA, 16 U.S.C. §§ 1532, 1533. No such requirement should be implied through the device of applying

the arbitrary and capricious standard of judicial review, 5 U.S.C. § 706(2)(A). No such numerical comparison appears in the Humane Society opinion, 865 F.3d at 602-03. The successful recovery of one or more populations within a broader listed species will predictably (and almost by definition) result in the recovered populations being larger in head count than other non-recovered, and thus smaller, populations existing within the boundaries of the original ESA listing. The healthier a population, the greater its numbers. *See* FWS E.R. 90.[7]

By failing to give due weight to these important factual and legal distinctions between the Humane Society wolf case and the present GYE grizzly case, the District Court turned to its analysis of whether FWS considered the legal and functional impact of GYE grizzly delisting on the other grizzly populations unjustifiably predisposed against FWS and the other defendants. As this Court has cautioned in a previous challenge to FWS efforts to delist the GYE grizzly bear

[7] Applying the District Court's numerical comparison approach, had FWS in delisting the GYE DPS said, "although the NCDE population is even larger than the GYE population and the NCDE population may be recovered and would likely qualify as a DPS, we promise we will never delist the NCDE, and thereby will ensure that the count of delisted bears in the GYE DPS is less than the count of listed bears in the rest of the original lower 48 listing," then GYE delisting would have been distinguishable from the Humane Society wolf case. Of course FWS could not responsibly have made such a promise, because all listing decisions must be made on the best available scientific and commercial information, 16 U.S.C. § 1533.

population, "[w]e, as judges, do not purport to resolve scientific uncertainties or ascertain policy preferences." Greater Yellowstone Coalition, 665 F.3d at 1019.

B. FWS Considered the Impact of GYE Grizzly Delisting on the Continuing Legal Status of Other Grizzly Populations and Found No Effect.

As noted above, FWS unequivocally determined in the Final Rule that the ESA protections of the remaining grizzly populations and uninhabited areas were continuing, and indicated that the only other population that might in the near future be under consideration for delisting was the large NCDE population. FWS E.R. 204-205, 214. The Code of Federal Regulations so provides. FWS E.R. 213-214 (amending 50 C.F.R. 17.11(h)). This alone was "consideration" of the legal impact of GYE grizzly delisting on the other populations. It was backed up by legal analysis discussed below that, while not prominent, was provided by FWS, and should have been reviewed by the District Court, which instead declared that FWS had declined to consider the legal impact of GYE delisting on other populations. FWS E.R. 31.

There are severe limits on the depth of the legal analysis that a reviewing court may properly demand from an agency. As the District Court acknowledged in another part of its opinion, FWS "is not required to analyze the law but only to comply with it." FWS E.R. 23. The Administrative Procedure Act only requires that, when issuing rules, the agency supply "a concise general statement of their basis and purpose," not an extended legal analysis. 5 U.S.C. § 553(c). Further, to

the extent, if any, that the agency is required to back-up legal conclusions with legal analysis in its statement of basis and purpose, one must remember that the statement of basis and purpose may be of "less than ideal clarity" so long as the agency's path may "reasonably be discerned."[8] Finally one must also remember that no party to this case or any other case has launched a legal challenge to the continuing validity of the lower 48 listing in preserving ESA protections for the other grizzly populations. Thus there is a highly hypothetical character to Plaintiffs' contentions that the continued ESA protections for the other grizzly populations are vulnerable to being invalidated. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 621 (9th Cir. 2014) ("We do not require agencies to analyze every potential consequence of every choice they make; to do so would put an impossible burden on agencies.")

With respect to legal analysis, FWS in the Final Rule stated that it agreed with the legal analysis in the Department of Interior Solicitor's Opinion M-37018, dated December 12, 2008 ("Opinion M-37018"), and that is action were "consistent with" that Opinion.[9] FWS E.R. 98. The Solicitor's Opinion holds that a broader ESA

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[8] "While we may not supply a reasoned basis for the agency's action that the agency itself has not given, we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)); *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 595 (1945)) (internal citations omitted) (emphasis added).

[9] *See* Solicitor's Opinion M-37018, Dec. 12, 2008, at 7 (available at

listing includes within it ESA listings of populations within the broader listing that might qualify as DPSs. *See* Opinion M-37018 at 7 ("If FWS lists an entire species, or a significant portion thereof, as endangered, it may be effectively listing several smaller and otherwise separately-listable entities within the range of that species …"). Thus, recognizing a DPS within a pre-existing broader species listing (here, a listing established in 1975) is not inconsistent with continuing the remainder of the broader original listing. *See id*. The D.C. Circuit in *Humane Society* cited and relied on the Solicitor's Opinion in its holding that FWS does have statutory legal authority to recognize a DPS from within a pre-existing broader listing and then delist (or uplist) that DPS. 865 F.3d at 593, 599-600. Other case precedent specifically holds that, when FWS recognizes a DPS from within a broader listing and assigns less ESA protection to that DPS, the remainder of the original listing may retain its original listing status, without FWS having to go through the process of declaring the remainder to be separate DPSs. *National Wildlife Federation v. Norton*, 386 F.Supp.2d 553, 565 (D. Vt. 2005).[10]

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https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37018.pdf).

[10] *See also, Greater Yellowstone Coalition v. Servheen*, 672 F. Supp. 2d 1105, 1125 (D. Mont. 2009) (in reviewing the prior GYE grizzly delisting order, district court declined to consider an issue regarding other grizzly populations as they would remain ESA protected), *aff'd in part and rev'd in part,* 665 F.3d 1015 (9th Cir. 2011).

With respect to the smaller populations and potential populations, FWS supplied an additional layer of discussion. FWS in the Final Rule discussed the history of the smaller grizzly populations (Selkirk, Cabinet-Yaak, and Northern Cascades) being accorded independent listing status as each have been found by a federal court and/or FWS to be warranted or possibly warranted for independent uplisting from threatened to endangered, specific to that population. FWS E.R. 98.[11] The warranted uplistings have not been carried out due to FWS's lack of resources to implement them - a lack of resources that will only be exacerbated if FWS must manage recovered populations such as the GYE grizzlies under the ESA. *See* 16 U.S.C. § 1533(b)(3)(B)(iii) ("warranted-but-precluded" listing status). Further, FWS noted that it has accorded special "experimental" status to any grizzly bears that might in the future occupy the now uninhabited Bitterroot Ecosystem, so that potential future population also has its own independent status. FWS E.R. 98. The already-established independent legal status of the smaller populations and potential future population strengthens the conclusion that delisting the GYE DPS will not trigger some kind of technical delisting of the remaining populations.[12]

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[11] *See Alliance for Wild Rockies v. Zinke*, 265 F.Supp.3d 1161, 1174-81 (D. Mont. 2017) (judicially restoring the Cabinet-Yaak population to its special status of "warranted but precluded" for uplisting from threatened to endangered status); *Carlton v. Babbitt*, 26 F.Supp.2d 102, 112 (D.D.C. 1998) (FWS erred in not uplisting the Selkirk population to endangered status).

[12] Having noted the special status of these various small populations (FWS E.R. 98), it was not essential that FWS directly opine that the individualized listing

Finally, FWS expanded on its discussion of the legal impact of GYE grizzly delisting on the other grizzly populations in its Regulatory Review Determination, which it issued after taking public comment on the impact of the D.C. Circuit's *Humane Society* decision on the GYE Grizzly Final Rule. In the Regulatory Review Determination, FWS explained that it was taking "the most precautionary and protective approach" through continuing ESA protections everywhere within the original listing outside the GYE DPS. 83 Fed. Reg. 18737, 18741 (Apr. 30, 2018).

There is at most one sentence in the District Court's opinion that digs into whether FWS could lawfully continue ESA protection for the remainder of the original Lower 48 listing. In that sentence, the District Court responds to a passage in FWS's brief to the District Court. The District Court observes that it "would be difficult" to provide continued ESA protections to areas where bears "have not been located for generations" because those undetected or non-existent bears might not be a "population" qualifying as an ESA-listable DPS. See FWS E.R. 25-26. Notably, the District Court was speaking of uninhabited areas (areas where bears "have not been located for generations"), as opposed to the existing Selkirk, Cabinet-Yaak, and Northern Cascades populations, whose qualifications for independent listing status under the ESA has already been established as discussed above. *Id.*

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status of each population means that they can continue to be listed after GYE DPS delisting. That is a logical implementation of independent status.

Even in this brief remark regarding uninhabited areas, the District Court did not acknowledge or review the Solicitor's Opinion discussed above which FWS adopted in the Final Rule (FWS E.R. 98), where the Solicitor explained that an ESA listing of a species includes a listing of DPSs within that species, such that a DPS can be recognized in the future and given different listing status, with the remainder of the original listing keeping its same listing status. *See* Opinion M-37018 at 7. That rationale is totally different from the theory of continued listing for uninhabited areas outside the GYE DPS on which the District Court expressed skepticism (the theory of declaring those uninhabited areas to be protectable as distinct population segments).

The District Court did not review, at least or meaningfully review, FWS's discussion of the legal impact of GYE grizzly delisting on the ESA listing status of the other grizzly populations and uninhabited areas within the original listing.

C. FWS Considered the Factual Issue of Whether GYE Grizzly Delisting Will Hinder Recovery of Smaller Grizzly Populations Through Discouraging Dispersal of Grizzlies from the GYE to the Smaller Populations, Where They Might Interbreed.

FWS also considered the functional impact of GYE grizzly delisting on the other populations. In this regard, the District Court held that FWS failed to "consider" how GYE grizzly delisting might hinder recovery of smaller grizzly bear populations by discouraging migration of bears from the GYE population to the smaller grizzly populations that might supplement those smaller populations. FWS

E.R. 26-32. "In this instance, the Service must consider how the delisting [of the GYE DPS] affects other members of the listed entity, the lower-48 grizzly bear, because decreased protections in the Greater Yellowstone Ecosystem necessarily translate to decreased chances for interbreeding." FWS E.R. 30 (emphasis added).

The District Court's directive that FWS "consider" this issue was erroneous because, as quoted below, FWS did consider it, at great length. Further, the District Court did not cite any portion of the record for the District Court's own fact-finding conclusion that other grizzly populations will "necessarily" suffer from "decreased chances for interbreeding" as a result of GYE grizzly delisting. See FWS E.R. 30.

FWS's Regulatory Review Determination analyzed in depth the concern that its action recognizing and delisting the GYE DPS could, by limiting dispersal opportunities, negatively impact other lower 48 grizzly populations:

> The primary potential impact of delisting the GYE DPS on the status of the listed species is the potential to limit dispersal from the GYE into other unrecovered ecosystems due to increased mortality within the DPS. However, we do not expect mortalities to increase significantly because the vast majority of suitable habitat inside the GYE DPS is within the DMA where bears are subject to [post-delisting] mortality limits. Grizzly bears remain protected by the Act outside the DPS. Additionally, food storage orders on public lands provide measures to limit mortality and promote natural connectivity through a reduction in conflict situations. (82 FR 30536, 30580, June 30, 2017). Despite these protections, successful dispersal events remain rare and play a very minor role in population dynamics because of the large amounts of unsuitable habitat between ecosystems. The probability of successful dispersal is low despite recent expansion of the GYE and NCDE populations (Peck et al. 2017, p. 15); accordingly, we have no recent evidence of successful dispersal from the GYE into any other

> ecosystem. However, populations in both ecosystems are currently expanding into new areas, and the GYE is expanding beyond the DMA. If populations continue to expand, decreasing the distance between populations, the likelihood of successful immigration will increase (Peck et al. 2017, p. 15). ***In short, we find that impacts of delisting the GYE DPS on the lower-48-States entity are minimal, do not significantly impact the lower-48-States entity, and do not affect the recovery of the GYE grizzly bears.*** This analysis does not warrant any revision or amendment of the Final Rule.

Regulatory Review; Determination, 83 Fed. Reg. 18737, 18740-41 (Apr. 30, 2018)(emphasis added) (copy supplied in Addendum to the FWS opening brief, p. 8a).

As indicated in this quotation, FWS concluded that any impact of delisting the GYE DPS on other grizzly populations was "minimal," for two reasons:

First, the grizzly populations in the Lower 48 States are too far from each other to facilitate dispersals between them. FWS found that there is a "large amounts of unsuitable habitat" that a dispersing grizzly would have to cross to get from the GYE DPS to get to another population (ecosystem). *Id.* Due to the difficulty of crossing these distance-based barriers, "[d]espite these protections" of the ESA for the last 40 years, "successful dispersal events remain rare and play a very minor role in population dynamics." *Id.* at 18,740. FWS specifically noted in the Regulatory Review that the only smaller grizzly populations known to exist (Selkirk and Cabinet-Yaak) or believed to exist (Northern Cascades) are distant from the GYE

DPS near Canada, making dispersal from the GYE to those other smaller populations even less likely, so GYE DPS delisting did not impact them:

> The Selkirk Ecosystem and Cabinet-Yaak Ecosystem are currently occupied and connected to grizzly bear populations in Canada. They, along with the North Cascades Ecosystem, are also beyond any known expected dispersal distance from the GYE. Therefore, any potential increased mortality in the GYE would not impact these populations.

Regulatory Review; Determination, 83 Fed.Reg. at 18740. FWS cited a map showing the locations of all Lower 48 grizzly populations. *Id*. at 18739.[13] FWS concluded that "we have no recent evidence of successful dispersal from the GYE into any other ecosystem." *Id*. at 18740. Despite this lack of dispersal from one population to another, the separate populations have existed for decades.

Second, FWS explained that GYE grizzly delisting leaves many state laws and federal lands unit laws and conservation measures in place to protect GYE grizzlies, thus minimizing any impact GYE delisting has on whatever ability GYE grizzlies might have to disperse and reach other populations. *Id*. at 18738. This discussion was most relevant to potential dispersal from the GYE DPS to the less distant Bitterroot Ecosystem (an area with no grizzly bear population but potential suitable habitat) and to the less distant the NCDE population (a large population) – although FWS noted that no successful dispersal events had been recorded in the

[13] www.fws.gov/mountain prairie/es/species/mammals/grizzly/GBdistributions.jpg.

past despite full ESA protections. *Id.* at 18739-40. FWS explained that the GYE DPS boundary where it faces towards the Bitterroot Ecosystem and NCDE is drawn to maximize post-delisting state law limits on mortality as a hypothetical dispersing grizzly within the GYE DPS approaches the boundary (the DMA zone where state law limits mortality runs all the way to the DPS boundary, and any grizzly that crosses over the boundary and leaves the DPS is ESA-protected). *Id.*; *see also* FWS E.R. 161. FWS explained that Montana is banning grizzly hunting on the most likely routes between the GYE DPS and the NCDE population (the State law ban would supersede the ESA ban on hunting in these area if the NCDE population is later delisted). *Id.* at 18740. FWS noted state and federal land unit initiatives to restrict the placement of food attractants in potential connectivity areas. *Id.*

The District Court implied that it gave less weight to this analysis by FWS in the Regulatory Review, because FWS issued the Regulatory Review after the filing of litigation challenging the Final Rule. FWS E.R. 30 ("The Service then published its Regulatory Review, after litigation was initiated, in a last-ditch attempt to prove to the Court that its review was sufficient. The Court cannot agree with the Service that Regulatory Review cures the inadequacy of the Final Rule."); *see also* FWS E.R. 22, n. 5 (finding Regulatory Review was "[a]rguably … an impermissible post-hoc rationalization"). The District Court's skepticism of the timing of the issuance of the Regulatory Review is unfair. When FWS issued the GYE Grizzly Final Rule,

the D.C. Circuit had not yet issued the *Humane Society* decision that focused on the impact of a DPS delisting on other populations of a listed species.[14] The agency cannot be expected to have a legal crystal ball. Agencies must be free to reconsider their decisions when subsequent events occur, including after important judicial rulings such as *Humane Society*. When the agency take public comment on the impact of the subsequent event and then issue a considered reconsideration decision, the analysis is properly considered by a reviewing court, and is not a post-hoc rationalization of agency counsel.[15] Certainly the District Court should have grappled with the thorough discussion of the dispersal issue FWS provided in the Regulatory Review. The District Court instead skipped past the analysis in the Regulatory Review. *See* FWS E.R. 30-32.

Moreover, the factual building blocks of the dispersal / connectivity analysis presented by FWS in the Regulatory Review are in the GYE Grizzly Final Rule, which no one contends is a post-hoc rationalization. Consider the following points made by FWS in the Final Rule:

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[14] The D.C. District Court in that case had earlier held (in a section of its opinion later rejected by the D.C. Circuit) that a DPS could never be recognized and delisted from within a more broadly listed species. *See Humane Society v. Jewell*, 76 F.Supp.3d 69, 112 (D.D.C. 2014). Thus that earlier opinion did not provide guidance on determining when a DPS delisting within a broader species was permissible.

[15] *See Citizens to Save Spencer Cnty. v. U.S. E.P.A.*, 600 F.2d 844, 884 n. 203 (D.C. Cir. 1987) (noting agency decision on rehearing may be considered by court).

- "The GYE grizzly bear population is the southernmost population remaining in the coterminous United States and has been physically separated from other areas where grizzly bears occur for at last 100 years. … [g]ene flow [between the populations] was low even 100 years ago." FWS E.R. 99 (providing cites).

- "[T]he DMA boundary [portion of the GYE DPS subject to strict post-delisting mortality limits under state law] extends all the way to the DPS boundary in sections to the west and north to facilitate connectivity between the GYE and both the NCDE and the Bitterroot ecosystem. Connectivity will be managed for in highway planning (YES 2016a, p. 83). Food storage orders are already in place on the majority of USFS lands to facilitate connectivity by minimizing human-grizzly bear conflicts (YES 2016a, pp. 84-85). Lastly, the Service currently partners with nongovernmental organizations who work to conserve important habitat linkage areas ….." FWS E.R. 161.

- "The 1993 Recovery Plan did not require connectivity for recovery of individual grizzly bear populations, and the Recovery plan indicated the Service's intention to delist distinct populations as they met recovery goals. …" FWS E.R. 162 (cited omitted).

- "Because it is generally accepted that isolated populations are at greater risk of extinction over the long term, the 2016 Conservation Strategy (YES 2016a, pp. 82-84) identifies and commits to a protocol to encourage natural habitat connectivity between the GYE and other grizzly bear ecosystems." FWS E.R. 191.

- "[B]ased on the best available scientific data about grizzly bear locations and movements, the GYE grizzly bear population and other remaining grizzly bear populations are markedly, physically separated from each other." FWS E.R. 162.

In short, the District Court leaped to the conclusion FWS arbitrarily and capriciously failed to "consider" an issue that FWS did in fact consider at length. "Although [the judicial review] inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to

substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). The District Court's review on this issue was conclusory and not searching and careful, and did not accord the deference due FWS for its work on this issue.

D. Conclusion Regarding FWS's Consideration of the Legal and Functional Impact of GYE Grizzly Delisting on Other Grizzly Populations.

This Court should reverse the District Court's judgment and remand to the District Court to consider the analysis FWS provided regarding the legal and functional impact of GYE grizzly delisting on the other grizzly populations within the original lower 48 grizzly listing. Because the District Court incorrectly held that FWS provided no such analysis, that Court never considered the adequacy of the analysis that FWS did provide in the Final Rule and Regulatory Review Determination. *See* FWS E.R. 23-32.

There is every reason to believe the analysis FWS did provide will survive judicial review on remand in the District Court, once the misunderstanding that FWS excluded the other grizzly populations from all consideration is cleared away.

By delisting a discrete population of grizzly bears that was once threatened with extinction but has now recovered, while continued protections for other grizzly bear populations, FWS properly applied a "system of incentives" to induce States and private actors to work to conserve and recovered imperiled species in

their areas, as the ESA directs the FWS to do. 16 U.S.C. § 1531(a)(5); *see Humane Society*, 865 F.3d at 598-99 ("empowering [FWS] to alter the listing status of segments [DPSs within a more broadly listed species] rewards those States that most actively encourage and promote species recovery within their jurisdictions," citing § 1531(a)(5)); *see also, id.* at 599 (Congress "inten[ded] to target the Act's provisions where needed, rather than to require the woodenly undifferentiated treatment of all members of a taxonomic species regardless of how their actual status and condition might change over time"). Delisting the recovered GYE DPS will free up resources that may help FWS finally carry out the uplistings of the smaller grizzly populations from threatened to endangered status that, as noted above, various courts and/or FWS have found is warranted, but precluded due to FWS's lack of resources.

II. Appellants SAF and RMEF Adopt the Briefs of Other Appellants on Other Issues.

SAF and RMEF adopt the briefs of other Appellants on all other issues in this case. A list of the other issues in the case and other briefs being adopted (with reference to specific page ranges in other Appellants' briefs) is provided above. *See* Statement of Issues and Adoption of Other Appellants' Briefs on Specific Issues.

III. Remedy.

This Court should reverse the District Court's judgment, which will reinstate the GYE Grizzly Final Rule. Alternatively, in order to allow FWS the opportunity to complete any further required analysis relating to the GYE Grizzly Final Rule, this Court should remand the GYE Grizzly Final Rule without vacatur. *See California Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 992 (9th Cir. 2012) (citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).

Wyoming's brief presents the remand without vacatur issue well (9th Cir. DE 59, pp. 50-52). However, there is an additional factor supporting consideration of that remedy. FWS's previous rule delisting GYE grizzlies was successfully challenged in the District of Montana a decade ago on the grounds that FWS arbitrarily concluded that the regulatory mechanisms were adequate and that a perceived decline in whitebark pine was non-threatening. *Greater Yellowstone Coalition*, 672 F.Supp.2d at 1126. On appeal in that case, this Court reversed the district court ruling as to the adequacy of regulatory mechanisms, but affirmed the district court on the narrow issue as to the need for FWS to further consider the decline of the whitebark pine or a food source for grizzly bears. *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d at 1032. On remand from this Court's 2011 decision, FWS in 2018 issued a new GYE DPS delisting rule, only to

face a new and different set of challenges concerning comprehensive status reviews, recalibration methods, genetic health, and the like. The District Court in the present case found no errors by FWS as to the sole issue (whitebark pine) remanded in the prior case.

FWS stated in its brief to this Court that it is already working on the remand. 9th Cir. DE 45, pp. 1-2. Should this Court affirm the remand of the GYE delisting rule with vacatur, any subsequent decision on remand would be a brand new delisting rule, once again exposing FWS to a set of new potential challenges on judicial review unrelated to the issues that were the basis of the two prior judicial remand orders. Think of the whack-a-mole game in an amusement arcade. Remand without vacatur would allow FWS to proceed more efficiently by reconsidering the Final Rule as to particular issues of concern to the Court, rather than starting from scratch and re-analyzing all of the hundreds of issues analyzed in the GYE Grizzly Final Rule.[16] When FWS had to start from scratch after the last remand with vacatur, it took FWS 9 years to produce the GYE Grizzly Final

[16] We recognize the counter-argument that hunting of grizzly bears during a remand without vacatur might impact the equities that go into the remand without vacatur analysis. To address that concern, the Court might properly provide for the District Court to retain jurisdiction during any such remand. That would allow the Plaintiffs to file a motion asking the District Court to renew the temporary injunctive relief prohibiting grizzly bear hunting that the District Court granted Plaintiffs during its consideration of the case (Dist. Court DE 254), without having to file a new suit.

Rule now under review, which spans 130 pages in the Federal Register, because of the vast number of issues FWS had to address.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

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. In the alternative, this Court should remand the GYE DPS Final Rule without vacatur so that FWS may provide further clarification analysis on any issue for which the Court believes clarification is needed.

Respectfully submitted this 21st day of June, 2019,

/s/ James H. Lister
James H. Lister
BIRCH HORTON BITTNER & CHEROT, P.C.
1100 Connecticut Ave., N.W. Suite 825
Washington, D.C. 20036
Telephone: (202) 659-5800
Facsimile: (202) 659-1027
Email: jlister@dc.bhb.com

Attorneys for Defendant-Intervenors Sportsmen's Alliance Foundation and Rocky Mountain Elk Foundation

STATEMENT OF RELATED CASES

The undersigned is aware of no related cases as defined in Circuit Rule 28-2.6

/s/ James H. Lister
James. H. Lister

ADDENDUM

To avoid duplication, please see the Addendum to Appellant FWS's brief (9th Cir. DE 45), which provides excerpts from pertinent statutes (16 U.S.C. §§1532 and 1533) and FWS's Regulatory Review Determination, 83 Fed.Reg. 18737 (April 30, 2018).

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