

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

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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

v.

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

and

STATE OF WYOMING, *et al.*,  
Intervenor-Defendant-Appellants.

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On Appeal from the United States District Court for the District of Montana,  
Case 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, The Honorable Dana L. Christensen

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**INTERVENOR-DEFENDANT-APPELLANTS WYOMING FARM BUREAU  
FEDERATION; WYOMING STOCK GROWERS ASSOCIATION;  
CHARLES C. PRICE; AND W&M THOMAN RANCHES, LLC'S  
RESPONSE AND REPLY BRIEF**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
GLOSSARY OF ACRONYMS AND ABBREVIATIONS.....	1
INTRODUCTION .....	2
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	3
I. THIS COURT HAS APPELLATE JURISDICTION OVER RANCHERS’ APPEAL.....	3
A. Ranchers Have Standing to Pursue Their Appeal .....	5
1. Ranchers have suffered an “injury in fact” .....	6
2. Ranchers’ injury is “fairly traceable” to the district court’s grant of summary judgment .....	10
3. Ranchers’ injury will be “redressed by a favorable decision” .....	11
4. WYFB and WSGA possess organizational standing .....	12
B. The Remand Rule Should Not Apply in This Case .....	13
II. FWS CORRECTLY DETERMINED THE GREATER YELLOWSTONE ECOSYSTEM GRIZZLY BEAR DISTINCT POPULATION SEGMENT SHOULD BE DESIGNATED AND DELISTED .....	16
A. The District Court Erred in Holding the Delisting Determination Was Unlawful.....	16
B. The Environmental and Tribal Appellees Have Waived All Claims Not Decided by the District Court .....	18
C. Aland’s Cross-Appeal Arguments Have No Basis in Fact or Law and Must Be Rejected .....	20
CONCLUSION .....	21
CERTIFICATE OF SERVICE .....	24

## TABLE OF AUTHORITIES

### Cases

<i>Alsea Valley Alliance v. Department of Commerce</i> , 358 F.3d 1181 (9th Cir. 2004) .....	13, 14
<i>California v. Tahoe Regional Planning Agency</i> , 792 F.2d 775 (9th Cir. 1986).....	15
<i>Colwell v. Dep’t of Health &amp; Human Servs.</i> , 558 F.3d 1112 (9th Cir. 2009) .....	12
<i>Didrickson v. U.S. Dep’t of Interior</i> , 982 F.2d 1332 (9th Cir. 1992) .....	5, 6, 10
<i>Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.</i> , 528 U.S. 167 (2000) .....	12
<i>Humane Society of the United States v. Zinke</i> , 865 F.3d 585 (D.C. Cir. 2017) .....	7, 9
<i>Idaho Farm Bureau Fed’n v. Babbitt</i> , 58 F.3d 1392 (9th Cir. 1995).....	5, 6, 10, 11
<i>Laub v. U.S. Dep’t of the Interior</i> , 342 F.3d 1080 (9th Cir. 2003) .....	4
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992) .....	6
<i>NL Industries, Inc. v. Sec’y of Interior of U.S.</i> , 777 F.2d 433 (9th Cir. 1985).....	5
<i>Nw. Forest Res. Council v. Glickman</i> , 82 F.3d 825 (9th Cir. 1996).....	14
<i>Pit River Tribe v. United States Forest Service</i> , 615 F.3d 1069 (9th Cir. 2010) .....	13, 14
<i>United States v. Washington</i> , 969 F.2d 752 (9th Cir. 1992).....	19

<i>W. Watersheds Project v. Kraayenbrink</i> , 632 F.3d 472 (9th Cir. 2011).....	5, 6, 11, 12
<i>Watt v. Energy Action Educ. Found.</i> , 454 U.S. 151 (1981).....	4
<i>Yniguez v. Arizona</i> , 939 F.2d 727 (9th Cir. 1991).....	5, 10

## **Rules**

Fed. R. App. P. 28(i) .....	14
Fed. R. App. P. 3(c)(1)(B) .....	19

## **Federal Register**

<i>Endangered and Threatened Wildlife and Plants; Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife</i> , 82 Fed. Reg. 30,502 (June 30, 2017) .....	13
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## **GLOSSARY OF ACRONYMS AND ABBREVIATIONS**

AL-ER	Appellee & Cross-Appellant Robert H. Aland's Supplemental Excerpts of Record
DPS	Distinct Population Segment
E.R.	Federal Appellants' Excerpts of Record
ESA	Endangered Species Act
FWS	U.S. Fish and Wildlife Service
GYE	Greater Yellowstone Ecosystem
Ranchers' F.E.R.	Intervenor-Defendant-Appellants Wyoming Farm Bureau Federation; Wyoming Stock Growers Association; Charles C. Price; and W&M Thoman Ranches, LLC's Further Excerpts of Record

## **INTRODUCTION**

Intervenor-Defendant-Appellants Wyoming Farm Bureau Federation; Wyoming Stock Growers Association; Charles C. Price; and W&M Thoman Ranches, LLC (collectively, “Ranchers”) respectfully file this combined response to the principal brief of Cross-Appellant Robert Aland and reply to the principal briefs of Plaintiffs-Appellees.

## **SUMMARY OF ARGUMENT**

Instead of rebutting Ranchers’ arguments directly, the majority of Plaintiff-Appellees raise red herring arguments asserting that Ranchers have failed to establish standing to pursue this appeal. These arguments are baseless, as Ranchers clearly have standing. Both non-trade association Intervenor-Defendants, Mr. Price and W&M Thoman Ranches, LLC have suffered, and continue to suffer, direct injury resulting from the district court’s improper reversal of the U.S. Fish and Wildlife Service’s designation and delisting of the Greater Yellowstone Ecosystem grizzly bear Distinct Population Segment. These injuries are directly traceable to the district court’s grant of summary judgment from which this appeal follows and would be redressed by this Court’s reversal of that decision and reinstatement of the U.S. Fish and Wildlife Service’s designation and delisting of the Greater Yellowstone Ecosystem grizzly bear. Further, these individuals are members of Ranchers’ two trade associations, thereby establishing organizational standing for those associations. Where Plaintiff-Appellees do attempt to address Ranchers’

arguments, their rebuttal is unpersuasive and not based upon the text of the Endangered Species Act.

Moreover, Plaintiff-Appellees now attempt to rely upon alternative arguments made at the district court below. These arguments are unavailable, however, because the district court expressly dismissed any claim related to these alternative arguments, and Plaintiff-Appellees failed to appeal from that decision. Accordingly, they have failed to preserve the alternative arguments that they now attempt to rely upon. Even if Plaintiff-Appellees have not waived those argument, their reliance on them is misplaced.

Finally, Cross-Appellant Aland's arguments either have no merit or concern claims that also are not properly before this Court. Aland conceded that several of his alternative arguments are based upon claims that were not fully briefed below. As a result, the district court never considered those arguments, and they cannot serve as a basis for affirming the district court's decision.

## **ARGUMENT**

### **I. THIS COURT HAS APPELLATE JURISDICTION OVER RANCHERS' APPEAL**

The Environmental and Tribal Appellees assert that because this Court purportedly lacks jurisdiction over the U.S. Fish and Wildlife Service's ("FWS") Appeal, then all intervenors were required to demonstrate Article III standing. *Answering Brief for Plaintiff-Appellee, WildEarth Guardians* ("WEG Br."), Case

No. 18-36030, ECF No. 91,<sup>1</sup> at 22–25; *Second Brief on Cross-Appeal (Answering Brief) for Appellees Alliance for the Wild Rockies, Western Watersheds Project, & Native Ecosystems Council* (“AWR Br.”), ECF No. 93, at 6–33; *Answering Brief for Plaintiff-Appellees, Crow Indian Tribe, et al.* (“Crow Br.”), ECF No. 96, at 5–13. As demonstrated in their respective briefs, however, this Court appropriately maintains jurisdiction over both FWS’s and the States’ appeals. *Response and Reply Brief for the Federal Appellants* (“FWS Br.”), ECF No. 124, at 5–10; *Reply and Answering Brief of Appellant State of Wyoming* (“Wyo. Br.”), ECF No. 132, at 6–25; *Appellants State of Montana and Montana Department of Fish, Wildlife and Parks Reply Brief* (“Mont. Br.”), ECF No. 134, at 2–12; *Response and Reply Brief for Appellant State of Idaho* (“Idaho Br.”), ECF No. 135, at 10–18. So long as this Court’s jurisdiction is proper as to one appellant, this Court need not examine the standing of any other appellant. *Laub v. U.S. Dep’t of the Interior*, 342 F.3d 1080, 1086 (9th Cir. 2003) (“Because the individual [appellants] have standing, we need not consider whether the Farm Bureau has standing.”); *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981).

The Environmental and Tribal Appellees do not argue that Ranchers lack standing. Instead, they merely argue that Ranchers have failed to establish that they

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<sup>1</sup> Hereinafter, unless otherwise specified, citations to court filings will be based upon the electronic docket contained within this Court’s CM/ECF database for the lead case, i.e. Case No. 18-36030.



possess standing in Ranchers’ Opening Brief. Curiously, these Appellees did not oppose Ranchers’ intervention at the District Court. *Order* (D. Mont. Mar. 14, 2018), Ranchers’ Further Excerpts of Record (“Ranchers’ F.E.R.”)<sup>2</sup> 67–70. Nonetheless, assuming *arguendo* that Ranchers are required to demonstrate standing, Ranchers easily satisfy Article III’s requirements.

#### **A. Ranchers Have Standing to Pursue Their Appeal**

Ranchers’ standing need not be based on whether they would have had standing to independently bring this suit, “but rather may be contingent on whether they have standing now based on a concrete injury related to the judgment.” *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 482–83 (9th Cir. 2011); *see Didrickson v. U.S. Dep’t of Interior*, 982 F.2d 1332, 1338 (9th Cir. 1992) (“To determine whether an intervenor may appeal from a decision not being appealed by one of the parties in the district court, the test is whether the intervenor’s interests have been adversely affected by the judgment.”) (citing *Yniguez v. Arizona*, 939 F.2d 727, 731–32 (9th Cir. 1991) and *NL Industries, Inc. v. Sec’y of Interior of U.S.*, 777 F.2d 433, 436 (9th Cir. 1985)); *see also Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1398 (9th Cir. 1995) (citing *Didrickson*, 982 F.2d at 1338 and *Yniguez*, 939 F.2d at 731–32). To invoke this Court’s jurisdiction on the basis of an injury

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<sup>2</sup> Ranchers’ Further Excerpts of Record are filed concurrently herewith, pursuant to Circuit Rule 30-1.8(a).

related to the judgment, Ranchers must establish that the district court's judgment causes their members a concrete and particularized injury that is actual or imminent and is likely to be redressed by a favorable decision. *W. Watersheds Project*, 632 F.3d at 482 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

### **1. Ranchers have suffered an “injury in fact”**

This Court has held that “[i]ntervenors in environmental litigation satisfy the injury in fact requirement by showing that group members have direct contact with the environmental subject matter threatened by the adverse decision.” *Idaho Farm Bureau Fed’n*, 58 F.3d at 1398 (citing *Didrickson*, 982 F.2d at 1340). Here, the subject matter is the Greater Yellowstone Ecosystem (“GYE”) grizzly bear and its delisting, with which Ranchers have been involved procedurally, economically, and, in some cases, physically.

Wyoming Farm Bureau Federation (“WYFB”), founded in 1920, is a non-profit, membership, trade association organized to represent agricultural producers throughout the State of Wyoming. *Declaration of Ken Hamilton*, Ranchers’ F.E.R. 39, ¶ 4. WYFB represents 23 county farm bureau associations, totaling over 2,600 member families working in agricultural production and over 10,000 non-agricultural members throughout the state. Ranchers’ F.E.R. 39–40, ¶¶ 4, 5. WYFB’s agricultural members consist of both ranchers and farmers in the State of Wyoming. Ranchers’ F.E.R. 39–40, ¶ 5. WYFB’s purpose is to protect, promote,

and represent the economic, social, and educational interests of its members at the local, state, and national levels; as well as protect private property rights and help members achieve an equitable return on their investment. Ranchers' F.E.R. 40, ¶ 6.

WYFB has actively participated in the development of grizzly bear management plans and strategies dating back to 2004. Ranchers' F.E.R. 42, ¶ 12. In 2004, WYFB, on behalf of itself and its members, submitted a petition to FWS to declare the GYE grizzly bear population a Distinct Population Segment ("DPS"), which was addressed in 2007 in FWS's first attempt to delist the GYE grizzly bear DPS. Ranchers' F.E.R. 42, ¶ 13. In 2016, WYFB again submitted comments to FWS supporting the designation and delisting of the GYE grizzly bear DPS. Ranchers' F.E.R. 42, ¶ 14. Finally, in response to FWS's request for public comment following *Humane Society of the United States v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017), WYFB submitted comments supporting the designation and delisting of the GYE grizzly bear DPS. Ranchers' F.E.R. 43, ¶ 16.

A number of WYFB members have suffered significant crop loss and livestock depredations resulting from the expansion of the GYE grizzly bear population, and the ongoing management, or lack thereof, of that population as a listed species. Ranchers' F.E.R. 41, ¶¶ 10, 11. W&M Thoman Ranches, LLC ("Thoman Ranches"), a member of WYFB, has suffered significant livestock losses, increased operating costs, and personal injuries to a ranch hand caused by grizzly

bears. *Declaration of W&M Thoman Ranches, LLC* (“Thoman Ranches Decl.”), Ranchers’ F.E.R. 60–64, ¶¶ 3, 8–10, 13, 15. In 2009, one of Thoman Ranches’ ranch hands was mauled by a female grizzly bear within the Greater Yellowstone Ecosystem area. Ranchers’ F.E.R. 61–62, ¶ 10. In 2009, Thoman Ranches suffered the loss of 29 ewes and 27 lambs, all to confirmed grizzly bear kills. Ranchers’ F.E.R. 63, ¶ 14. In 2010, another 53 ewes and 51 lambs were lost to confirmed grizzly bear depredations. Ranchers’ F.E.R. 63, ¶ 14. In 2015, Thoman Ranches suffered the loss of a total of 47 ewes and 112 lambs. Ranchers’ F.E.R. 62–63, ¶ 13. In 2016, Thoman Ranches lost a total of 73 ewes and 131 lambs. Ranchers’ F.E.R. 62–63, ¶ 13. Many of the 2015 and 2016 losses were confirmed as grizzly bear depredations; the actual number of depredations, however, was likely much higher due to the difficulties with having a loss officially confirmed as a grizzly depredation. Ranchers’ F.E.R. 62–63, ¶ 13.

Wyoming Stock Growers Association (“WSGA”), founded in 1872, is a tax-exempt, membership organization established to represent livestock producers in the State of Wyoming. *Declaration of James H. Magagna*, Ranchers’ F.E.R. 46, ¶ 4. WSGA currently represents over 1,200 livestock producers in Wyoming. Ranchers’ F.E.R. 46, ¶ 4. WSGA advocates on issues affecting the livestock industry, Wyoming agriculture, rural community living, and the livestock related interests of its members. Ranchers’ F.E.R. 46–47, ¶ 5. As part of its mission, WSGA informs

and educates the public regarding the role of the livestock industry in the state, as well as engaging in advocacy by commenting on issues affecting WSGA and its members and participating in litigation. Ranchers' F.E.R. 46–47, ¶¶ 5, 6.

WSGA has provided comment on grizzly bear recover plans, the Grizzly Bear Conservation Strategy, Wyoming's Grizzly Bear Management Plan, and other grizzly bear conservation and management plans, in their various iterations, beginning with the earliest consideration for Endangered Species Act ("ESA") listing for the grizzly bear. Ranchers' F.E.R. 48, ¶ 11. In 2006, WSGA submitted comments to FWS supporting the designation and delisting of the GYE grizzly bear DPS. Ranchers' F.E.R. 48–49, ¶ 12. In 2016, WSGA submitted comments to FWS again supporting the designation and delisting of the GYE grizzly bear DPS. Ranchers' F.E.R. 49, ¶ 13. WSGA further advocated for returning conservation and management of the delisted GYE grizzly bear population to the various states. Ranchers' F.E.R. 49, ¶ 13. Additionally, in response to FWS's request for public comment following *Humane Society of the United States v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017), WSGA again submitted comments supporting the designation and delisting of the GYE grizzly bear DPS. Ranchers' F.E.R. 49, ¶ 15.

A number of WSGA members have suffered significant livestock depredations resulting from the expansion of the GYE grizzly bear population, and the ongoing management, or lack thereof, of that population as a listed species.

Ranchers’ F.E.R. 48, ¶ 10. Charles C. Price, a member of WSGA, avers that he personally has suffered confirmed livestock losses due to grizzly bear depredation. *Declaration of Charles C. Price*, Ranchers’ F.E.R. 53–54, ¶ 1, 7. Additionally, Mr. Price averred that he has suffered indirect losses resulting from grizzly bear activity, including (a) reduced weight gain in his livestock, which decreases the market price he receives; (b) decreased fertility and conception in his livestock resulting from stress induced by grizzly encounters; and (c) increased costs resulting from locating and subsequently relocating cattle that have fled from grizzly bears. Ranchers’ F.E.R. 54–55, ¶ 8.

Based upon Ranchers’ history with grizzly bear management, and their members’ direct losses resulting from grizzly bears, Ranchers have established an injury in fact resulting from the continued, unwarranted protections that will result from the district court’s setting aside FWS’s decision to designate and remove the GYE grizzly bear DPS from the federal List of Endangered and Threatened Species.

## **2. Ranchers’ injury is “fairly traceable” to the district court’s grant of summary judgment**

For standing on appeal, an intervenor need not show it independently could have sued the party who prevailed in district court. *Didrickson*, 982 F.2d at 1338. “Intervenors can allege a threat of injury stemming from the order they seek to reverse, an injury which would be redressed if they win on appeal.” *Idaho Farm Bureau Fed’n*, 58 F.3d at 1399 (citing *Yniguez*, 939 F.2d at 731–32). Here, because

of the district court’s grant of summary judgment in favor of Appellees, Ranchers continue to be subjected to ESA limitations regarding the GYE grizzly bear, despite the fact the GYE grizzly bear population has recovered; continues to expand its territorial reach, causing increased human-bear conflicts; and that there is no significant concern for extinction. Ranchers, and their members, will continue to suffer economic losses, amplified operational expenses, and increased safety concerns caused by the rebounded GYE grizzly bear and as a direct result of the district court’s order invalidating the 2017 Final Rule<sup>3</sup> returning the GYE grizzly bear to the federal List of Endangered and Threatened Species. *See W. Watersheds Project*, 632 F.3d at 483–84 (intervenor’s injury in fact was traceable to district court’s judgment).

### **3. Ranchers’ injury will be “redressed by a favorable decision”**

An intervenor’s injury must be likely to be redressed by a favorable decision on appeal. *Id.* Here, a favorable decision is not just *likely* to redress Ranchers’ injuries, it is fairly *certain* to. *See Idaho Farm Bureau Fed’n*, 58 F.3d at 1399 (“Intervenors can allege a threat of injury stemming from the order they seek to reverse, an injury which would be redressed if they win on appeal.”). Should this

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<sup>3</sup> *Endangered and Threatened Wildlife and Plants; Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife* (“2017 Final Rule”), 82 Fed. Reg. 30,502 (June 30, 2017), II E.R. 83–214.

Court overturn the district court's grant of summary judgment, the GYE grizzly bear would be considered a DPS and would be removed from the federal List of Endangered and Threatened Wildlife under the reinstated 2017 Final Rule. The result would be state-level management of the GYE grizzly bear DPS and science-based population management. Not only would this allow Ranchers' and their members to work directly with their local officials to address concerns and issues with the GYE grizzly bear, but population management conducted locally by the states would also help to address and reduce human-bear conflict and would aid in retaining appropriate territorial boundaries for the GYE grizzly bear DPS.

#### **4. WYFB and WSGA possess organizational standing**

Additionally, since WYFB and WSGA seek associational standing on behalf of their members, there are three related but distinct Article III standing requirements. *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1122 (9th Cir. 2009).

An association has standing to bring suit on behalf of its members when [1] its 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.

*Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (bracketed numbers added). Interests such as those demonstrated above by WYFB and WSGA, including those established by their members, have been held to be sufficient to establish organizational standing. *See W. Watershed Project*, 632



F.2d at 483–84 (holding the Public Lands Council had organizational standing based upon its members’ agricultural uses of lands implicated by Bureau of Land Management grazing regulations).

Here, WYFB and WSGA have demonstrated that they have members, such as Thoman Ranches and Mr. Price, that would otherwise have standing in their own right. *See supra* Section I(A)(1). Further, WYFB and WSGA have demonstrated that wildlife management, and its impacts on agricultural uses, is an interest germane to their purposes. *Id.* Finally, participation by the individual members of WYFB or WSGA is not required in this case—WYFB and WSGA, along with Thoman Ranches and Mr. Price, are more than capable to represent the individual members’ interests in this matter. Accordingly, WYFB and WSGA have established organizational standing.

### **B. The Remand Rule Should Not Apply in This Case**

WildEarth Guardians argues that this Court should dismiss all appeals because the district court’s September 24, 2018 Order remanding the delisting determination is not a final, appealable order. WEG Br. at 24. Citing *Pit River Tribe v. United States Forest Service*, 615 F.3d 1069 (9th Cir. 2010), and *Alsea Valley Alliance v. Department of Commerce*, 358 F.3d 1181 (9th Cir. 2004), WildEarth Guardians asserts that this Court should decline to review the September 24, 2018 Order under the “administrative remand” rule. *Id.* at 23–25. Neither *Pit River* nor *Alsea Valley*,

however, articulate a categorical prohibition against review of a remanded action—and *Pit River* specifically states the opposite. *Pit River*, 615 F.3d at 1075–76 (“*Alsea* did not announce a hard-and-fast rule prohibiting a non-agency litigant from appealing a remand order.”) (citing *Alsea Valley*, 358 F.3d at 1184). As demonstrated by the State of Wyoming, the Remand Rule should not be applied against intervenors in this case. Wyo. Br. at 7–14.<sup>4</sup>

Further, FWS’s acceptance, in part, of a remand of the delisting determination underscores the very reason why intervention was sought by Ranchers. To demonstrate that intervention is appropriate, this Court requires an applicant in intervention show its interests will not be adequately protected by the existing parties. *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996). This Court considers numerous factors to determine whether the applicant in intervention’s interests will be adequately represented by an existing party, including:

(1) whether the interest of a present party is such that it will undoubtedly make all the intervenor’s arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect.

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<sup>4</sup> Pursuant to Fed. R. App. P. 28(i), Ranchers expressly adopt and incorporate by reference the State of Wyoming’s argument with respect to the application of the Remand Rule contained within its Response and Reply Brief.

*Id.* (citing *California v. Tahoe Regional Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986)).

At the district court, Ranchers argued intervention was appropriate because FWS may not make all of Ranchers’ arguments or that it would be unwilling to do so. *Brief in Support of Wyoming Farm Bureau Federation, Wyoming Stock Growers Association, Charles Price, and W&M Thoman Ranches’ Motion to Intervene*, Ranchers’ F.E.R. 29–32. Ranchers’ concern has now proven well-founded: FWS is unwilling or unable to make the arguments advanced by Ranchers to the direct detriment and injury of Ranchers. *Compare Intervenor-Defendant-Appellants Wyoming Farm Bureau Federation; Wyoming Stock Growers Association; Charles C. Price; and W&M Thoman Ranches, LLC’s Opening Brief* (“Ranchers’ Op. Br.”), ECF No. 77, 16–30 (arguing the ESA does not require FWS to analyze any “remnant population” and the district court inappropriately substituted its own scientific conclusions for those of the expert agency) *with Opening Brief for the Federal Appellants*, ECF No. 45 (failing to make Ranchers’ arguments); *see also Didrickson*, 982 F.2d at 1339 (“The Government’s acquiescence in the district court judgment effectively is the same as promulgating a regulation that is contrary to the [Ranchers’] position.”). FWS’s failure to vindicate the rights and interests of Ranchers in this litigation is precisely the reason Ranchers intervened at the district court and appealed the district court’s grant of summary judgment to this Court,

independent of FWS. Accordingly, rigid application of the Remand Rule to this case would negate Ranchers' intervention, rendering them little more than an *amici curiae*.

## **II. FWS CORRECTLY DETERMINED THE GREATER YELLOWSTONE ECOSYSTEM GRIZZLY BEAR DISTINCT POPULATION SEGMENT SHOULD BE DESIGNATED AND DELISTED**

### **A. The District Court Erred in Holding the Delisting Determination Was Unlawful**

In their Opening Brief, Ranchers focus on two principle arguments: (1) FWS is not required to analyze the impact of designating and delisting a distinct population segment on the "remnant population," and (2) the district court erred in substituting its judgment for that of FWS when the court reinterpreted science FWS relied on to support its scientific conclusions. Ranchers' Op. Br. at 16–30.

Appellees WildEarth Guardians, Alliance for the Wild Rockies, *et al.*, Humane Society of the United States, *et al.*, the Crow Indian Tribe, *et al.*, and Cross-Appellant Robert H. Aland make no response to Ranchers' first argument. *See* ECF Nos. 91, 93, 94, 96, 101. Instead, these Appellees make the tactical choice to rely on the red-herring arguments regarding this Court's jurisdiction and the standing of the intervenors in this case addressed above, and adopt by reference the argument of Appellee the Northern Cheyenne Tribe, *et al.*, concerning Ranchers' remnant population analysis argument. *Id.* The Northern Cheyenne Tribe's response, however, is unpersuasive.

The Northern Cheyenne Tribe argues that, when designating a DPS, “the ‘species’ affected by any such revision includes not just the DPS, but the revised remnant as well.” *Opening Brief of Plaintiff-Appellees Northern Cheyenne Tribe, et al.* (“N. Cheyenne Br.”), ECF No. 92, at 26. This argument fails to grasp the fact that the creation of a DPS, under FWS policy, creates an entirely new species for purposes of the required analysis. Ranchers’ Op. Br. at 16–24. Only if FWS were to delist the non-GYE population of the lower-48 grizzly bear would it have to proceed through the ESA’s Section 4 analysis for that species. But in this case, as only the DPS is being delisted, FWS needed only examine the ESA’s Section 4 analysis for the GYE grizzly bear DPS. In reality, the non-GYE population retains its full ESA protections as a threatened species. Accordingly, the district court’s Order is in error and must be reversed for the reasons discussed within Ranchers’ Opening Brief and the Opening Briefs of the State of Wyoming;<sup>5</sup> State of Idaho; Safari Club, *et al.*; and the Sportsmen’s Alliance Foundation, *et al.*<sup>6</sup> Ranchers’ Op. Br. 16–24; *Opening Brief of Appellant State of Wyoming*, ECF No. 59, at 45–52; *Opening Brief for Appellant State of Idaho*, ECF No. 63, at 13–19; *Opening Brief of*

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<sup>5</sup> Ranchers, however, do not adopt the position that FWS is entitled to *Chevron* deference in this matter.

<sup>6</sup> With the exception noted *supra*, note 5, pursuant to Fed. R. App. P. 28(i), Ranchers expressly adopt and incorporate by reference the States’ and other Intervenor’s arguments concerning the propriety of requiring FWS to consider effects on any “remnant population” of the GYE grizzly bear DPS.

*Intervenors-Defendants-Appellants Safari Club International and the National Rifle Association of America*, ECF No. 74, at 5–15; *Opening Brief for Intervenor-Defendants/Appellants Sportsmen’s Alliance Foundation and Rocky Mountain Elk Foundation*, ECF No. 78, at 9–32.

No Appellee responded to Ranchers’ second argument that the district court impermissibly substituted its judgment for that of the expert agency. Indeed, the only mention of this argument appears in the introduction to WildEarth Guardians’ response brief. WEG Br. at 3–4. There, WildEarth Guardians makes only a conclusory statement regarding the argument that the district court erred in substituting its judgment for that of the expert agency. *Id.* (“It is not enough for the Service to invoke its scientific expertise – the Service must actually use it, consider the relevant factors, articulate a rational connection between the facts found and the choices made, and offer an explanation for its decision that is supported by evidence in the record. The record reveals the Service failed to do so in this case . . . .” (citations omitted)). No substantive argument on this issue follows within the body of argument contained within the brief. Accordingly, Ranchers make no further argument in reply.

**B. The Environmental and Tribal Appellees Have Waived All Claims Not Decided by the District Court**

In the alternative, WildEarth Guardians; the Northern Cheyenne Tribe, *et al.*; and the Crow Indian Tribe, *et al.* ask this Court to affirm the lower court’s grant of

summary judgment based upon claims those parties asserted below, but which were not reached by the lower court in its September 24, 2018 Order. *See* WEG Br. at 60–81 (presenting alternative arguments); N. Cheyenne Br. at 50–65 (presenting additional alternative argument); Crow Br. at 13 (adopting alternative arguments). This case, however, presents a relatively unusual posture in that WildEarth Guardians; the Northern Cheyenne Tribe, *et al.*; and the Crow Indian Tribe, *et al.* have not filed cross-appeals. This omission is fatal to these appellees’ alternative arguments.

While, in general, this Court may affirm a grant of summary judgment “on any basis supported by the record even if the district court did not rely on that basis,” *United States v. Washington*, 969 F.2d 752, 755 (9th Cir. 1992) (internal quotation and citation omitted), it is equally the case that this Court must limit its review to only those orders designated in the notice of appeal, *see* Fed. R. App. P. 3(c)(1)(B) (requiring a notice of appeal to “designate the judgment, order, or part thereof being appealed”). Following the September 24, 2018 Order granting summary judgment, the district court issued a second Order on October 23, 2018. I AL-ER 30–32.<sup>7</sup> The October 23, 2018 Order expressly dismissed “any remaining claims” in the consolidated action. I AL-ER 31. Necessarily, this dismissal included all claims

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<sup>7</sup> Appellee and Cross-Appellant Robert H. Aland’s Supplemental Excerpts of Record, Volume I, is filed at ECF No. 101-2.

briefed below but not relied upon by the district court in its September 24, 2018 Order. WildEarth Guardians; the Northern Cheyenne Tribe, *et al.*; and the Crow Indian Tribe, *et al.* failed to appeal the October 23, 2018 Order dismissing their remaining claims. Accordingly, those claims are not properly before this Court, and cannot serve as basis to uphold the district court's decision.

WildEarth Guardians; the Northern Cheyenne Tribe, *et al.*; and the Crow Indian Tribe, *et al.* have failed to preserve their alternative claims, which have been dismissed without appeal. As a result, the September 24, 2018 Order must rise or fall based solely on the analysis provided within its four corners.

**C. Aland's Cross-Appeal Arguments Have No Basis in Fact or Law and Must Be Rejected**

Cross-Appellant Aland is the only party to the instant appeal that has designated the October 23, 2018 Order in his Notice of Appeal. II E.R. 66–70.<sup>8</sup> In so doing, Aland attempts to preserve six of his claims. II E.R. 66–67 (“The purpose of this protective cross-appeal is to preserve for judicial consideration and resolution, if necessary, certain claims by Plaintiff Aland that were not addressed and resolved by [the district court] on their merits in the September 24, 2018, Order and October 23, 2018, Order.”). Aland admits, however, that only three of these six claims were fully briefed below: Claim 1 (offensive non-mutual collateral estoppel), Claim 3

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<sup>8</sup> Hereinafter, all citations to “E.R.” are to the Federal Appellants’ Excerpts of Record, ECF Nos. 46–47, cited by volume and then page number.



(public comment requirements), and Claim 5 (recovery criteria). II E.R. 67–68, n. 2, 4, 6. Accordingly, only those three fully briefed claims can serve as alternative grounds to affirm the lower court’s grant of summary judgment. Regardless, none of Aland’s six claims has merit, and all must be rejected.<sup>9</sup>

### CONCLUSION

For the foregoing reasons, and those more fully provided in Ranchers’ Opening Brief, ECF No. 77, this Court should reverse the district court’s September 24, 2018 Order, and uphold FWS’s 2017 Final Rule designating and removing the Greater Yellowstone Ecosystem grizzly bear Distinct Population Segment from the federal List of Endangered and Threatened Species.

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<sup>9</sup> Pursuant to Fed. R. App. P. 28(i), Ranchers expressly adopt and incorporate by reference Federal Appellants’ argument with respect to Mr. Aland’s alternative claims contained within their Response and Reply Brief at 53–58.

Additionally, pursuant to Fed. R. App. P. 28(a), to the extent that FWS, Idaho, Montana, and Wyoming’s Response and Reply Briefs contain replies to Appellee’s responses to arguments asserted by those parties that Ranchers incorporated in their Opening Brief, Ranchers’ Op. Br. at 12, Ranchers also incorporate those reply arguments as if fully set forth herein, unless otherwise specified.

DATED this 1st day of November 2019.

Respectfully submitted,

/s/ Cody J. Wisniewski

Cody J. Wisniewski

MOUNTAIN STATES

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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### **CERTIFICATE OF SERVICE**

I hereby certify that on November 1, 2019, I electronically filed the foregoing *Intervenor-Defendant-Appellants Wyoming Farm Bureau Federation; Wyoming Stock Growers Association; Charles C. Price; and W&M Thoman Ranches, LLC's Response and Reply Brief* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit via the appellate CM/ECF system, which will serve all registered CM/ECF users.

Additionally, I further certify that on November 1, 2019, I served an identical copy of the foregoing brief by first class U.S. mail to the following, unregistered case participant:

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/s/ Cody J. Wisniewski

Cody J. Wisniewski

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