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

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

v.

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

and

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

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-0016 (Hon. Dana C. Christensen)

REPLY AND ANSWERING BRIEF OF APPELLANT STATE OF WYOMING

JAY A. JERDE
Special Assistant Attorney General
ERIK E. PETERSEN
Senior Assistant Attorney General
Wyoming Attorney General's Office
2320 Capitol Avenue
Cheyenne, WY 82002
(307) 777-6946 (phone)
jay.jerde@wyo.gov
Attorneys for State of Wyoming

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

GLOSSARY

Demographic Monitoring Area ..... DMA

Endangered Species Act ..... ESA

United States Fish and Wildlife Service and the other Federal Appellants (collectively) ..... Service

The States of Idaho, Montana, and Wyoming (collectively) ..... States

Memorandum of Agreement Regarding the Management And Allocation of Discretionary Mortality of Grizzly Bears in the Greater Yellowstone Ecosystem ..... Tri-State Agreement

Greater Yellowstone Ecosystem Grizzly Bear Distinct Population Segment ..... Yellowstone Segment

INTRODUCTION

In addition to addressing the merits of the three issues raised in this appeal, the Appellees collectively have advanced several other arguments in an effort to convince this Court to affirm the district court judgment. To hear the Appellees tell it, the Service misconstrued facts and misapplied the law repeatedly in the preamble to the 2017 delisting rule. But their arguments, though numerous and lengthy, miss the mark factually and legally.

The Appellees' arguments on issues other than the three raised on appeal distract from the issues actually before this Court. In particular, the jurisdictional arguments either overlook or misconstrue Ninth Circuit precedent in an attempt to avoid having to defend the district court judgment on its merits.

When they do address the merits of the judgment, they fare no better than the district court did. Their merits arguments fail because, in more than 200 pages of briefing between them, the Appellees do not answer three basic questions regarding the recalibration, delisting analysis, and translocation issues.

With respect to the recalibration issue, the Appellees do not explain why the Yellowstone Segment will have to be re-listed if the signatories to the Conservation Strategy adopt a new population estimator and do not recalibrate the annual total population management goal. They argue that hundreds of bears may be killed if the States do not recalibrate the management goal, but this additional

mortality (if it ever happens) will not cause the grizzly bear population to decrease to the point where the Yellowstone Segment will have to be re-listed.

With respect to the delisting analysis issue, the Appellees do not explain why the delisting of the Yellowstone Segment should depend upon how that delisting impacts the broader listed species. The ESA authorizes the Service to delist a distinct population segment when it has recovered. The ESA does not condition the delisting of a recovered distinct population segment on the outcome of a status review for the broader listed species.

And, with respect to the translocation issue, the Appellees do not explain why the States must commit to proactively translocate grizzly bears into the Yellowstone Segment in the future before the Segment can be delisted. Genetic health will not be a concern in the Yellowstone Segment for decades, if ever, so proactive translocation of bears into the Segment is not biologically necessary now and will not be biologically necessary within the foreseeable future.

In the final analysis, the Appellees' arguments cannot be squared with the material facts and the pertinent law. The district court judgment is flawed factually and legally and therefore cannot stand. This Court should reverse the district court judgment on the three issues raised in this appeal and reinstate the 2017 delisting rule.

SUMMARY OF THE ARGUMENT

I. This Court has jurisdiction over Wyoming's appeal. The remand rule does not apply here because this Court has jurisdiction over the Service's appeal. If this Court does not have jurisdiction over the Service's appeal, the district court judgment still is a final, appealable order. The judgment is a final, appealable order because, on remand, Wyoming cannot achieve the relief it seeks here. Alternatively, the judgment is a final, appealable order because: (a) it conclusively resolved the recalibration, delisting analysis, and translocation issues; (b) the judgment may result in a wasted remand proceeding because, if the district court judgment is wrong on any of those issues, the judgment will force the Service to apply an erroneous rule; and (c) review of the issues raised in this appeal will be foreclosed if this Court does not review them now because the issues will be moot if the Service and Wyoming comply with the judgment on remand.

If this Court determines that it does not have jurisdiction over the Service's appeal but the district court judgment is a final, appealable order, Wyoming has Article III standing to pursue this appeal. Wyoming has three legally protected and judicially cognizable interests that have been injured by the fact that the ESA now preempts any conflicting Wyoming law governing the management of grizzly bears in the state. The judgment caused the injuries to Wyoming's interests because it resulted in the reinstatement of the ESA protections that now preempt

Wyoming law. A favorable ruling from this Court will redress Wyoming's injuries because reinstatement of the 2017 delisting rule will remove the ESA protections and thereby stop the preemption of Wyoming law.

II. The Service properly excluded recalibration from the Yellowstone Segment delisting analysis because the signatories will not adopt a new population estimator within the foreseeable future. The Appellees' arguments on the recalibration issue do not explain why the Yellowstone Segment will have to be re-listed if the signatories to the Conservation Strategy adopt a new population estimator but do not recalibrate the annual total population management goal. The States' regulatory mechanisms reasonably ensure that any discretionary mortality that results from a decision not to recalibrate will not cause the grizzly bear population within the DMA of the Yellowstone Segment to decrease to the point where the Segment will have to be re-listed.

The evidence that the Appellees cite in their recalibration arguments does not support their arguments. None of the emails they cite say or suggest that: (a) not recalibrating the annual total population management goal posed a threat to the Yellowstone Segment; (b) the best available science mandate required the signatories to include recalibration language in the Conservation Strategy; or (c) the Service dropped the recalibration language from the Strategy for political reasons.

The Service was not required to provide a reasoned explanation for its decision to remove the recalibration language from the Conservation Strategy because it did not make any factual findings regarding recalibration in a prior final agency action. In addition, recalibration will not be an issue within the foreseeable future because no evidence in the administrative record shows that a new population estimator to replace the model-averaged Chao2 method likely will be developed within the foreseeable future.

III. The Service complied with the ESA when it performed a delisting analysis for the Yellowstone Segment without also doing a status review of the other grizzly bear populations living in the continental United States. The Service's construction of the term "species" is entitled to *Chevron* deference because it is reasonable and it aligns with the congressional intent that the authority to designate a distinct population segment gives the Service the discretion to provide different protections for different populations of a species. The construction adopted by the district court and preferred by the Appellees contravenes that congressional intent.

IV. Wyoming generally agrees with the Service's arguments in response to the Appellees' arguments on the translocation issue. In addition, Wyoming has committed to consider translocation if the genetic health of the Yellowstone Segment becomes a concern at some point in the future. This commitment provides an appropriately measured regulatory response to an ill-defined issue.

V. Wyoming generally agrees with the Service's arguments in response to the Appellees' arguments beyond the three issues raised on appeal. In addition, the States' regulatory mechanisms and the Tri-State Agreement provide that the States will account for all conflict mortality from the past year when they determine the amount of discretionary mortality to allow in the current year.

VI. Wyoming generally agrees with the Service's arguments in response to Cross-Appellant Robert H. Aland's cross-appeal arguments.

ARGUMENT

I. THIS COURT HAS APPELLATE JURISDICTION OVER THE ISSUES RAISED BY WYOMING IN THIS APPEAL.

Appellee WildEarth Guardians contends that this Court lacks jurisdiction over Wyoming's appeal because the district court judgment is not a final, appealable decision. (WildEarth Guardians Br., at 22-25). Appellees Alliance for the Wild Rockies, Western Watersheds Project, and Native Ecosystems Council (collectively "the Alliance Appellees") and Appellee Crow Tribe group[1] contend that this Court lacks jurisdiction because Wyoming does not have standing to appeal. (Alliance Br., at 20) (citations omitted); (Crow Tribe Br., at 12-13). Both of these jurisdictional arguments lack merit as a matter of law.

[1] The Crow Tribe group consists of nineteen separately named parties. (Crow Tribe group Br., at 1).

A. The Remand Rule Does Not Preclude Wyoming From Appealing The District Court Judgment To This Court.

Appellee WildEarth Guardians contends that this Court must dismiss Wyoming's appeal because the remand component of the district court judgment prevents it from being a final, appealable order. (WildEarth Guardians Br., at 24). WildEarth Guardians cites two Ninth Circuit cases as support for this argument – *Alsea Valley Alliance v. Department of Commerce*, 358 F.3d 1181 (9th Cir. 2004) (as interpreted in *Pit River Tribe v. United States Forest Service*, 615 F.3d 1069, 1075-77 (9th Cir. 2010)) and *Natural Resources Defense Council v. Guitierrez*, 457 F.3d 904 (9th Cir. 2006). (WildEarth Guardians Br., at 24). WildEarth Guardians' remand rule argument is wrong because this Court has jurisdiction over the Service's appeal. But even if this Court does not, the district court judgment still is a final, appealable order.

1. The district court judgment is a final, appealable order because this Court has jurisdiction over the Service's appeal.

WildEarth Guardians argues that this Court lacks jurisdiction over the Service's appeal because the Service has appealed only part of the relief granted in the district court judgment. (WildEarth Guardians Br., at 22) (citing *Nat. Res. Def. Council*, 457 F.3d 904). This argument fails because, for the reasons explained in the Service's Response and Reply Brief, this Court has jurisdiction over the Service's appeal. *See* (Fed. Appellants' Br., at 5-9). Even if this Court determines

that it does not have jurisdiction over the Service's appeal, the remand rule does not apply here.

2. Even if this Court does not have jurisdiction over the Service's appeal, the district court judgment still is a final, appealable order.

This Court's jurisdictional inquiry does not end if it determines that it does not have jurisdiction over the Service's appeal. The *Alsea Valley* court "did not announce a hard-and-fast rule prohibiting a non-agency litigant from appealing a remand order." *Pit River Tribe*, 615 F.3d at 1075 (citation omitted). Generally speaking, a remand order is a final, appealable order if "the relief sought by appellants cannot possibly be achieved through the district court's directions." *United States v. U.S. Bd. of Water Comm'rs*, 893 F.3d 578, 595 (9th Cir. 2018) (citation omitted).

In other circumstances where a federal agency does not appeal a remand order, the order may be final and appealable if: (1) the order "conclusively resolves a separable legal issue"; (2) the order forces the federal agency "to apply a potentially erroneous rule which may result in a wasted proceeding"; and (3) "review would, as a practical matter, be foreclosed if an immediate appeal were unavailable." *Pit River Tribe*, 615 F.3d at 1075 (quoting *Alsea Valley*, 358 F.3d at 1184). The elements of the finality test "are considerations, rather than strict

prerequisites." *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1175 (9th Cir. 2011) (citation omitted).

a. The district court judgment is a final, appealable order because, on remand, Wyoming cannot possibly achieve the relief it seeks here.

On appeal, Wyoming essentially seeks to have the Yellowstone Segment delisted under the terms and conditions of the 2017 delisting rule. If the district court judgment goes unreviewed, the Service most likely will address the recalibration, delisting analysis, and translocation issues on remand and, if it does, it must follow the district court's direction on those issues. *See Olivas-Motta v. Whitaker*, 910 F.3d 1271, 1280 (9th Cir. 2018) (citations omitted) (stating that, under the rule of mandate, "an administrative agency may not deviate from a supervising court's remand order …."); *see also Ischay v. Barnhart*, 383 F. Supp. 2d 1199, 1213 (C.D. Cal. 2005) (citations omitted) (stating that, generally, "an administrative agency is bound on remand to apply the legal principles laid down by the reviewing court."). If the Service complies with the judgment, it will not agree to delist the Yellowstone Segment under the terms and conditions of the 2017 delisting rule. Thus, on remand, Wyoming cannot achieve the relief it seeks here. As a result, the district court judgment is a final, appealable order and this Court does not need to address the three element finality test. *U.S. Bd. of Water Comm'rs*, 893 F.3d at 595.

b. Alternatively, the district court judgment is a final, appealable order because it satisfies all three elements of the finality test.

If this Court decides to address the elements of the finality test, all three elements are satisfied in this case.

The first element of the finality test is satisfied here because the district court judgment conclusively resolved three separable legal issues. A district court judgment conclusively resolves a separable legal issue if it resolves an issue raised on appeal to this Court. *U.S. Bd. of Water Comm'rs*, 893 F.3d at 595. Here, the district court conclusively resolved the recalibration issue, (1ER40), the delisting analysis issue (1ER31-32), and the translocation issue (1ER48). This fact alone makes each of these issues a separable legal issue.

In addition, a district court judgment conclusively resolves a separable legal issue if it invalidates a federal agency's interpretation of a statute. *Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir. 1990). A district court judgment also conclusively resolves a separable legal issue if it holds that the agency applied an incorrect legal standard. *Kaho v. Ilchert*, 765 F.2d 877, 880 (9th Cir. 1985). In holding that the Service must perform a status review of the other grizzly bear populations in the continental United States, the district court expressly rejected the Service's conclusion that the ESA did not require it to do so. (1ER26). The district court also held that the Service did not apply the best available science

standard correctly with respect to the recalibration and translocation issues. (1ER40); (1ER45). The district court judgment thus conclusively resolved three separable legal issues.

The second element of the finality test is satisfied here because allowing the district court judgment to stand without appellate review may result in a wasted proceeding. If the district court's holding on any one of the issues raised on appeal is erroneous, then the proceedings on remand will be wasted because the Service will be required to apply the law incorrectly. *Chugach Alaska Corp.*, 915 F.2d at 457.

The third element of the finality test is satisfied here because allowing the district court judgment to stand without appellate review would, as a practical matter, foreclose judicial review of the three issues raised on appeal. On remand, these issues will either be rendered moot or will not be subject to the same review standard in a subsequent appeal.

As the *Sierra Forest Legacy* court acknowledged, the finality test "deals in practice, not theory." *Sierra Forest Legacy*, 646 F.3d at 1175. Therefore, in assessing the third element of the finality test, this Court should focus on what the Service likely will do on remand, and not on what it theoretically might do. *See id*.

If this Court does not review the district court judgment, the Service most likely will address the recalibration, delisting analysis, and translocation issues on

remand. If it does, it will be bound by the judgment during the remand proceedings. *Olivas-Motta*, 910 F.3d at 1280; *Ischay*, 383 F. Supp. 2d at 1213. Thus, on remand the Service most likely will perform the additional analysis as required by the district court and demand that Wyoming amend its regulatory mechanisms to provide for recalibration and translocation in the manner described by the district court. If these things happen, then the district court's rulings on the issues raised in this appeal will be moot when the Service adopts a new delisting rule and, as a result, judicial review of those issues will be foreclosed. *See, e.g.*, *Chugach Alaska Corp.*, 915 F.2d at 457.

If Wyoming refuses to make the demanded changes, the Service most likely will not move forward with a new delisting rule and will use the district court judgment as its excuse for not doing so. In this scenario, Wyoming could file a petition to delist the Yellowstone Segment on the same terms and conditions established in the preamble to the 2017 delisting rule.[2] *See* 16 U.S.C. § 1533(b)(3); *see generally* 50 C.F.R. § 424.14. If the Service denied the petition on the basis that the district court judgment precluded it from delisting the Segment on those terms and conditions, Wyoming could obtain judicial review of that final agency action by appealing to a federal district court (presumably in the District of

[2] The petition to delist technically would be a petition to amend or repeal a rule. *See* 5 U.S.C. § 553(e).

Wyoming). *See, e.g., Am. Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 4-5 (D.C. Cir. 1987) (a case involving an appeal from the denial of a petition for rulemaking under section 553(e)).

This alternative judicial review process would be different than the judicial review available in this appeal in two respects.

First, judicial review of the denial of the petition to delist would focus on whether the Service acted arbitrarily and capriciously by relying on the Montana district court judgment to deny the petition. In this appeal, this Court will review whether the Montana district court acted arbitrarily and capriciously by vacating the 2017 delisting rule. As a practical matter, the court reviewing the denial of the petition to delist would focus on whether the district court judgment here binds the Service on remand and likely would not review whether the district court correctly decided the recalibration, delisting analysis, and translocation issues.

Second, although the arbitrary and capricious standard of review applies in both appeals, it does not apply in the same manner. On appeal, a reviewing court will afford more deference to an agency's denial of a petition for rulemaking than it will afford to a district court judgment in an appeal such as this one. *See Am. Horse Prot. Ass'n*, 812 F.2d at 4-5 (explaining that "an agency's refusal to institute rulemaking proceedings is at the high end of the range" of deference afforded to an agency decision under the arbitrary and capricious standard). Thus, the Service

likely will be afforded more deference in an appeal from a denial of a petition to delist than the district court judgment will be afforded in this appeal. As a result, allowing the district court judgment to go unreviewed deprives Wyoming of the type of judicial review available in this appeal.

For the foregoing reasons, all of the elements of the finality test are satisfied here. As a result, the district court judgment is a final, appealable order even if this Court concludes that it does not have jurisdiction over the Service's appeal.

B. Wyoming Has Standing To Pursue This Appeal Because The District Court Judgment Injured Wyoming's Legally Protected And Judicially Cognizable Interests And A Favorable Ruling In This Appeal Will Redress Those Injuries.

The Alliance Appellees and the Crow Tribe group Appellees argue that Wyoming must establish that it has Article III standing because this Court does not have jurisdiction over the Service's appeal. (Alliance Br., at 13-19); (Crow Tribe Br., at 2-3). The Alliance Appellees also argue that Wyoming must establish that it has standing because it seeks different relief than the Service. (Alliance Br., at 14-15; 20) (citation omitted).

Wyoming does not have to establish Article III standing independent of the Service because this Court has jurisdiction over the Service's appeal. *Cf. Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993) (citation omitted) ("The general rule applicable to federal court suits with multiple plaintiffs is that once the court determines that one of the plaintiffs has standing, it need not decide the standing of

the others."). But if this Court concludes that Wyoming must establish Article III standing, it easily can do so.[3]

To establish Article III standing, Wyoming must show that: (1) the district court judgment caused an "injury in fact" to Wyoming; (2) the injury is "fairly traceable" to the judgment; and (3) the injury likely will be redressed by a favorable decision in the appeal. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1398-99 (9th Cir. 1995). As a sovereign, Wyoming is entitled to "special solicitude" in the standing analysis because it has a procedural right to challenge agency action under the ESA and it has a stake in protecting the sovereign or quasi-sovereign interests described below. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

1. The district court judgment caused an "injury in fact" to Wyoming's legally protected and judicially cognizable interests arising from state law and from federal law.

To establish that it has suffered an injury in fact, Wyoming must show that the district court judgment has caused "'an invasion of a legally protected interest' that is concrete and particularized, and actual or imminent, not conjectural or

[3] The issues raised on appeal fall within the scope of subsection (g)(1)(C) in the ESA citizen suit provision. *See* 16 U.S.C. § 1540(g)(1)(C); *see also* (1ER4; 14-16; 31-33; 36; 38-41; 48).The citizen suit provision in the ESA negates the prudential "zone of interests" test for standing. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA*, 415 F.3d 1078, 1102 n.17 (9th Cir. 2005) (citation omitted). Accordingly, the "zone of interests" test does not apply here.

hypothetical." *Beck v. U.S. Dep't of Commerce*, 982 F.2d 1332, 1340 (9th Cir. 1992) (citation omitted). A legally protected interest "may arise from the Constitution, from common law, or solely by virtue of statutes creating legal rights, the invasion of which creates standing. Both federal law and state law — including state statutes - can create interests that support standing in federal courts." *Cottrell v. Alcon Labs.*, 874 F.3d 154, 164 (9th Cir. 2017) (citations and internal quotation marks omitted) (shortened dash in original).

This Court also has described the term "injury in fact" as "an invasion of a judicially cognizable interest." *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1157 (9th Cir. 1998) (citation omitted). A "judicially cognizable interest" is an interest that "can support standing even if it is not protected by law (at least, not protected in the particular case at issue) so long as it is the sort of interest that courts think to be of sufficient moment to justify judicial intervention." *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1172 (10th Cir. 2006); *see also Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 951 n.23 (9th Cir. 2013) (acknowledging the Tenth Circuit's definition of "judicially cognizable interest").

The injury in fact requirement distinguishes "a person with a direct stake in the outcome of a litigation — even though small — from a person with a mere interest in the problem." *Cottrell*, 874 F.3d at 162 (9th Cir. 2017) (citation and

internal quotation marks omitted). It requires the party seeking to establish standing to show "some specific, identifiable trifle of an injury. It is not Mount Everest." *Id*. (citations and internal quotation marks omitted).

The district court judgment injured at least three legally protected and judicially cognizable interests of Wyoming. Any one of these injuries satisfies the injury in fact requirement for Article III standing.

a. The district court judgment injured Wyoming's legally protected interest in creating and enforcing its legal code.

A state has a legally protected interest in its sovereign power to create and enforce a legal code. *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 601 (1982); *see also California v. FCC*, 75 F.3d 1350, 1361 (9th Cir. 1996) (acknowledging that a state has a sovereign interest in law enforcement) (citation omitted). The Wyoming Legislature enacted a comprehensive regulatory scheme to provide for the management and protection of all wildlife in Wyoming, including grizzly bears. *See generally Wyoming Statutes Annotated* Title 23 (2019). The Wyoming Game and Fish Commission also adopted a regulation to govern the management of grizzly bears in the state in areas subject to state management jurisdiction. *See* (WY-FER70-73).

Because Wyoming has a legally protected interest in enforcing its legal code, it suffers an injury in fact when federal regulatory action preempts state law. *See, e.g.*, *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir.

2008) (citations omitted); s*ee also Virginia v. Sebelius*, 656 F.3d 253, 269 (4th Cir. 2011) (collecting cases where a state satisfied the injury in fact requirement because federal regulatory action preempted the state's ability to enforce its legal code). When the district court vacated the 2017 delisting rule, ESA protections for the Yellowstone Segment were reinstated. *See* 84 Fed. Reg. 37144, 37144 (July 31, 2019). As a result, the ESA now preempts any Wyoming statute and regulation governing grizzly bear management that conflicts with the ESA or 50 C.F.R § 17.40(b).[4] *See, e.g., Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 852 (9th Cir. 2002) (holding that the ESA preempted a California state statute to the extent that the statute prevented federal agencies from protecting species listed under the ESA). This act of preemption alone satisfies the injury in fact requirement for Wyoming to have Article III standing. *Wyoming ex rel. Crank*, 539 F.3d at 1242; *Virginia*, 656 F.3d at 269.

[4] For example, the prohibition on the "take" of grizzly bears in § 17.40(b) preempts the Department's authority under state law to relocate grizzly bears or to lethally remove grizzly bears to address conflict problems or human safety concerns. *Compare* 50 C.F.R § 17.40(b) *with* Wyo. Stat. Ann. § 23-1-302(a)(vi),(vii); Wyo. Stat. Ann. § 23-1-1001; *see attached* (Nesvik Decl. ¶ 15).

b. The district court judgment injured Wyoming's legally protected and judicially cognizable interest in managing wildlife living in Wyoming.

Related to (but different from) its interest in enforcing its legal code, Wyoming also has a legally protected and judicially cognizable interest in managing all wildlife living within the state, including grizzly bears. The protection of wildlife within its borders is one of a state's "most important interests." *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1013 (9th Cir. 1994). The United States Supreme Court considers "the [s]tates' interests in conservation and protection of wild animals as legitimate local purposes similar to the [s]tates' interests in protecting the health and safety of their citizens." *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979). It also has described wildlife management as "a substantial regulatory interest" of a state. *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 390 (1978). And the Wyoming Supreme Court has noted that Wyoming has "the power and duty to protect, preserve, and nurture the wild game" living within the state. *O'Brien v. State*, 711 P.2d 1144, 1149 (Wyo. 1986).

The regulatory scheme established in Title 23 of the Wyoming Statutes requires the Wyoming Game and Fish Commission and the Wyoming Game and Fish Department to actively manage and protect all wildlife in the state, including grizzly bears. *See* Wyo. Stat. Ann. § 23-1-103 ("It is the purpose of this act and the policy of the state to provide an adequate and flexible system for control,

propagation, management, protection and regulation of all Wyoming wildlife."). Wyoming state law thus codifies and protects Wyoming's important and substantial regulatory interest in managing the wildlife within its borders, including grizzly bears. The re-listing of the Yellowstone Segment preempted this legally protected and judicially cognizable interest. The preemption of this interest also satisfies the injury in fact requirement for Wyoming to have Article III standing. *Wyoming ex rel. Crank*, 539 F.3d at 1242; *Virginia*, 656 F.3d at 269.

c. The district court judgment injured Wyoming's legally protected and judicially cognizable interest in the time, resources, and money it spent to achieve the recovery and delisting of the Yellowstone Segment.

Wyoming has a legally protected and judicially cognizable interest arising from the resources it has expended to achieve the recovery and delisting of the Yellowstone Segment. For more than four decades, Wyoming has invested a significant amount of resources to monitor and manage grizzly bears living in Wyoming with the goal of fostering the recovery of the grizzly bear population in the state to the point where it can be delisted. (WY-FER20); (WY-FER36).

Wyoming also pursued several efforts to make the delisting of the Yellowstone Segment possible. For example, the Wyoming Game and Fish Department invested time, effort, and resources to revise the Wyoming Grizzly Bear Management Plan (May 11, 2016) and promulgate a grizzly bear management regulation. (WY-FER1-69; 70-73); *see also* (WY-SER9, 37, 38, 45,

46); *see attached* (Nesvik Decl. ¶¶ 8-11). It also invested time, effort, and resources working with the other signatories to revise the Conservation Strategy and working with Idaho and Montana to develop the Tri-State Agreement to govern the allocation and management of discretionary mortality for the Yellowstone Segment. (3ER217-349); (WY-FER74-86); (WY-SER69-70; 74; 79; 108-112; 146-50; *see attached* (Nesvik Decl. ¶¶ 12-14). In addition, the administrative record as a whole shows that Wyoming worked collaboratively with the Service to ensure that all of the legal requirements for delisting were satisfied before the Service promulgated the 2017 delisting rule.

Without these efforts by Wyoming, the Service would not have had a legal basis to delist the Yellowstone Segment under the ESA. As a result, Wyoming's efforts give it a "direct stake" in the delisting of the Yellowstone Segment under terms and requirements of the 2017 delisting rule. *Cottrell*, 874 F.3d at 162. These efforts also give rise to an interest that this Court should find "to be of sufficient moment to justify judicial intervention." *In re Special Grand Jury 89-2*, 450 F.3d at 1172. Wyoming, therefore, has a legally protected and judicially cognizable interest arising from its efforts to recover the grizzly bear population in the Yellowstone Segment and to have the Segment delisted under terms and requirements of the 2017 delisting rule.

The district court judgment injured this legally protected and judicially cognizable interest. The vacatur of the 2017 delisting rule undermined Wyoming's efforts by preventing the delisting of the Yellowstone Segment under terms and requirements of the 2017 delisting rule.

2. Wyoming's injuries are "fairly traceable" to the district court judgment because the judgment resulted in the preemption of Wyoming's authority to manage grizzly bears in the state under state law.

To establish that its injuries are "fairly traceable" to the district court judgment, Wyoming must demonstrate "a causal connection" between its injuries and the judgment. *Nat. Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 994-95 (9th Cir. 2000). The judgment caused the injuries described in Section I(B)(1)(a)-(c) above because the vacatur of the 2017 delisting rule resulted in the preemption of Wyoming's authority to manage grizzly bears in the state under state law. 84 Fed. Reg. at 37144; (1ER1; 49). Thus, Wyoming's injuries are fairly traceable to the judgment.

3. A favorable decision from this Court will redress Wyoming's injuries because reinstatement of the 2017 delisting rule will return management authority over grizzly bears in the state to Wyoming.

To establish that a favorable decision from this Court will redress its injuries, Wyoming must show there is a substantial likelihood that the relief it has requested will remedy its injuries in fact. *Vt. Agency of Nat. Res. v. United States*,

529 U.S. 765, 771 (2000). When a district court vacates a delisting rule, any injury caused by the district court judgment will be redressed if the court of appeals orders the delisting rule to be reinstated. *See, cf., Idaho Farm Bureau Fed'n*, 58 F.3d at 1399 (case involving the vacatur of a listing rule). If this Court reinstates the 2017 delisting rule, Wyoming will no longer suffer the injuries described above. Thus, a favorable ruling from this Court will redress Wyoming's injuries.

For the foregoing reasons, all three elements of the Article III standing test are satisfied here. Accordingly, Wyoming has standing to pursue this appeal.

4. The Appellees' procedural arguments regarding standing overlook pertinent Ninth Circuit precedent.

The Alliance Appellees and the Crow Tribe group Appellees both argue that Wyoming does not have standing to pursue this appeal because it did not address standing in its opening brief. (Alliance Br., at 20) (citations omitted); (Crow Tribe Br., at 12-13). The Alliance Appellees also appear to argue that, under the precedent in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), Wyoming cannot file affidavits with this Court to establish standing because judgment was entered below and that judgment has been appealed. (Alliance Br., at 15-16) (citation omitted). Both arguments overlook pertinent Ninth Circuit precedent.

The Alliance Appellees and the Crow Tribe group Appellees essentially argue that Wyoming waived its Article III standing because it did not address the issue in its opening brief. A state, however, cannot waive Article III standing. *San*

Diego Unified Port Dist. v. Gianturco, 651 F.2d 1306, 1309 n.7 (9th Cir. 1981) (citations omitted).

Whether Wyoming has standing to pursue this appeal was not at issue until the Alliance Appellees and the Crow Tribe group Appellees made it an issue during the briefing stage on appeal. Now that they have done so, Wyoming can establish that it has standing during the briefing phase because it was not required to do so until now. *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527-28 (9th Cir. 1997) (citation omitted); *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 483 n.6 (9th Cir. 2011). Wyoming may submit affidavits or declarations on appeal in support of its standing argument.[5] *Nw. Envtl. Def. Ctr.*, 117 F.3d at 1528 (the court accepted affidavits during briefing stage of an appeal); *W. Watersheds Project*, 632 F.3d at 483 n.6 (the court accepted declarations during briefing stage of an appeal). Wyoming also may rely on evidence in the administrative record to establish its standing. *See Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002) (citation omitted) ("In many if not most cases the petitioner's standing to seek review of administrative action is self-

[5] In *Western Watersheds Project*, the federal government argued that *Summers* prohibited the panel from considering standing declarations filed on appeal because they were filed after the district court entered final judgment. *W. Watersheds Project*, 632 F.3d at 483 n.6. The *Western Watersheds Project* court rejected this argument and considered the declarations. *Id*.

evident; no evidence outside the administrative record is necessary for the court to be sure of it."). Accordingly, the arguments directed at the procedural aspects of the standing issue are meritless.

II. THE SERVICE CORRECTLY DETERMINED THAT THE YELLOWSTONE SEGMENT SHOULD BE DELISTED EVEN THOUGH THE SIGNATORIES DID NOT INCLUDE RECALIBRATION LANGUAGE IN THE CONSERVATION STRATEGY.

Appellees the Humane Society and The Fund for Animals (collectively "the Humane Society Appellees") take the laboring oar for all of the Appellees on the recalibration issue. In more than thirty pages of briefing, they advance five different arguments to explain why the district court's holding on the recalibration issue is correct. (Humane Society Br., at 13-45).

The Humane Society Appellees base their recalibration arguments on two speculative assumptions. First, they assume the States will allow a significant amount of discretionary mortality if the signatories to the Conservation Strategy adopt a new population estimator and do not also recalibrate the annual total population management goal and the sex and age-based annual total mortality limits. No material evidence in the administrative record suggests that the States will do so.

Second, they assume that the population management goal and the annual mortality limits will not be recalibrated if the signatories replace the Chao2

estimator. No evidence in the administrative record supports such an assumption. The ESA leaves it to the States to decide how to manage the Yellowstone Segment after delisting. *See Gibbs v. Babbitt*, 214 F.3d 483, 503 (4th Cir. 2000). For the foreseeable future, they will use the model-averaged Chao2 method as the population estimator. If the signatories replace Chao2 with a new estimator at some point beyond the foreseeable future, the States (in consultation with the signatories) will determine at that time whether the population management goal and the mortality limits should be adjusted.

The Humane Society Appellees' assumptions aside, the evidence in the administrative record shows that none of their recalibration arguments have merit.

A. Adopting A New Population Estimator Without Recalibration Does Not Pose A Threat To The Yellowstone Segment.

The Humane Society Appellees first contend that "[t]he Service identified the effect of a changing population estimator as a threat to the population sufficient to single-handedly render delisting unwarranted." (Humane Society Br., at 28). To this end, they argue that evidence in the administrative record shows "the Service's field biologists, long-time grizzly bear specialists, regional managers, and high-ranking officials uniformly agreed (along with expert public commenters, peer reviewers, and other federal agencies) that a Conservation Strategy lacking a recalibration provision would be inadequate and pose a threat to the population."

(Humane Society Br., at 21). As explained below, the Humane Society Appellees' threat argument fails both factually and legally.

1. Any additional discretionary mortality that may result directly from a decision to not recalibrate will not cause the population in the Yellowstone Segment to become endangered or threatened.

The Humane Society Appellees do not argue that the Service erred by approving the model-averaged Chao2 method as the current population estimator. Instead, they contend that the implementation of a new population estimator without recalibration at some unspecified time after delisting poses a threat to the delisted Yellowstone Segment because, if the States do not recalibrate the annual population goal and the annual mortality limits, a significant number of grizzly bears would be lawfully killed. (Humane Society Br., at 15). The Humane Society Appellees apparently believe this possibility by itself poses a threat to the Yellowstone Segment. But, for purposes of the ESA, it does not.

In the 2017 delisting rule, the Service explained that, to be a "threat" for purposes of a delisting analysis, a factor must have "the capacity (*i.e.,* it should be of sufficient magnitude and extent) to affect the species' status such that it meets the definition of endangered or threatened" under the ESA. (2ER101). The Service delisted the Yellowstone Segment on the basis that it has recovered, (2ER84), so after delisting the Segment will be threatened or endangered only if it no longer qualifies as a recovered population. (2ER101). Therefore, in assessing whether

increased discretionary mortality after delisting poses a threat to the Segment, the relevant inquiry is whether the amount of discretionary mortality in a given year will cause the grizzly bear population within the DMA to drop to the point where the Segment is no longer recovered and would have to be re-listed.

In terms of population size, the Service determined that the Yellowstone Segment is recovered as long as there are at least 500 grizzly bears within the DMA. (2ER95). This minimum recovery threshold does not depend on the specific method used to estimate the total bear population,[6] (2ER93), so it will not change if the signatories adopt a new population estimator in the future. Therefore, if a new population estimator is adopted after delisting, the Segment will continue to be recovered as long as there are at least 500 grizzly bears within the DMA. The existing state regulatory mechanisms reasonably ensure that discretionary mortality will not cause the population within the DMA to drop below 500 bears.

The existing state regulatory mechanisms reasonably ensure that the DMA will have at least 600 grizzly bears after delisting, regardless of the amount of discretionary mortality in a given year. The States will manage the grizzly bear population within the DMA for an annual population of between 600 and 747

[6] In its Opening Brief, Wyoming twice stated that, in 1993, the Service eliminated the tie between Demographic Recovery Criterion 1 and the specific method used to count bears. (Wyo. Opening Br., at 8 (citing 2ER93); *Id*. at 30 n.5 (citing 2ER93)). The temporal reference in these statements is incorrect. The Service eliminated the tie between Criterion 1 and the counting method in the 2017. (2ER93).

bears, with the goal of managing the population around 674 bears. (2ER136). If the total population within the DMA drops below 600 bears, the States must halt all discretionary mortality of bears, except as necessary for human safety, until the total population number returns back to more than 600 bears. (2ER136).

If the States halt discretionary mortality, the grizzly bear population in the DMA will be as protected (and arguably more protected) than it was when the Yellowstone Segment was listed under the ESA. With discretionary mortality all but prohibited, it is unlikely that the total population will remain below 600 bears for an extended period of time. *Id*. These regulatory safeguards ensure that the grizzly bear population within the DMA will not drop below 500 bears.

To the extent that the Humane Society Appellees are arguing that the lack of recalibration will result in too many mortalities too quickly, the States will apply specific sex and age-based annual total mortality limits to prevent a significant number of discretionary mortalities in a given year. (2ER95; 96 (Table 2); 112-13 & Table 3). They will suspend grizzly bear hunting within the DMA if any of the annual mortality limits is met at any time during the year, regardless of whether the allocated regulated harvest limits have been met. (2ER113). The annual mortality limits thus ensure that the grizzly bear population within the DMA will not decline too rapidly. Or, in other words, the annual mortality limits allow the States to

manage for a stable grizzly bear population within the DMA even though discretionary mortality may cause the size of the population to decrease.

If the signatories to the Conservation Strategy adopt a new population estimator and do not recalibrate, the States will continue to manage the Yellowstone Segment for an annual population of around 674 bears within the DMA and will continue to adhere to the annual mortality limits. Thus, the amount of discretionary mortality in a given year will not cause the population within the DMA to drop to the point where the Yellowstone Segment is no longer recovered because the state regulatory mechanisms will prevent that from happening.

The Humane Society Appellees insist that not recalibrating the population management goal will "undermine" the management goal of around 674 grizzly bears. (Humane Society Br., at 36). But they do not explain how or why. They also contend that not recalibrating the population management goal and the annual mortality limits will "cause the management mechanisms in the Conservation Strategy to become dangerously untethered from the conservation goals they were meant to achieve …." (Humane Society Br., at 15). The Humane Society Appellees have not cited evidence to support this point, but even if this were true, they have not explained why this will cause the grizzly bear population within the DMA to decrease to the point where the Yellowstone Segment is no longer recovered and would have to be re-listed.

As a practical matter, the annual total population management goal creates a management buffer of around 174 bears to ensure that the grizzly bear population in the DMA does not drop below 500 bears. The Humane Society Appellees do not contest that the current management buffer of around 174 bears reasonably ensures that the grizzly bear population within the DMA will not drop below 500 bears.

If a new population estimator shows that the DMA has substantially more grizzly bears than was estimated by the model-averaged Chao2 method, then recalibrating the population management goal upward will significantly increase the numerical size of this buffer because the minimum recovery threshold of at least 500 bears within the DMA will not change with a new population estimator. The Humane Society Appellees have not explained why a management buffer of around 174 is not biologically sufficient if a new population estimator is adopted. Or, stated differently, they have not explained why a numerically larger management buffer is biologically necessary just because a new population estimator says the population within the DMA is larger than previously estimated.

Viewed holistically, the existing state regulatory mechanisms reasonably ensure that the DMA will have at least 600 grizzly bears (and likely significantly more) after delisting. Thus, changing the population estimator without also recalibrating the population management goal and the annual mortality limits does not constitute a threat to the Yellowstone Segment because doing so will not cause

the grizzly bear population within the DMA to decrease to the point where the Yellowstone Segment is no longer recovered.

When all is said and done, the Humane Society Appellees' threat argument is a policy argument, not a legal argument. In the ESA, Congress determined that federal protections for a listed species should be removed once the species has recovered. *See Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1024 (9th Cir. 2011) ("A major goal of the ESA's protections is recovery of threatened and endangered species such that they can be removed from the list.") (citations omitted). And, after ESA protections for a species are removed, Congress left it to the affected states to decide how best to manage the species as long as they maintain the total population of the species at or above recovery levels. *Gibbs*, 214 F.3d at 503.

After delisting, if a new population estimator replaces the model-averaged Chao2 method, the States (in consulation with the signatories) may decide that the population management goal and the associated mortality limits should be adjusted. But, consistent with the ESA, that is a management decision for the States to make when (or if) a new population estimator replaces Chao2. Any concerns the Humane Society Appellees have about the post-delisting management of the Yellowstone Segment should be directed to the state policymakers, not to this Court.

2. The evidence cited by the Humane Society Appellees does not show that the Service believed that a lack of commitment to recalibration posed a threat to the Yellowstone Segment.

The Humane Society Appellees assert that the Service believed "a Conservation Strategy lacking a recalibration provision would be inadequate and pose a threat to the population." (Humane Society Br., at 21). They cite numerous emails authored by Service officials and employees as support for this assertion. (Humane Society Br., at 18-20 (citations omitted). But none of the emails actually say that the Service viewed the lack of a recalibration provision as a threat.

In the emails, the comments of all but one of the authors focused on the same concern – the adoption of a new total population estimator without also recalibrating the annual total population management goal could result in hundreds of grizzly bears being subject to discretionary mortality.[7] *See, e.g.,* (6JSER1223, 1233, 1235.1, 1236-37, 1238, 1243, 1253, 1254, 1256, 1268-70, 1271). None of the authors said that the possible population decrease at some unknown point in the future meant that the Yellowstone Segment would have to remain listed as

[7] The comment by the peer reviewer is not relevant to the recalibration issue. The comment focused on the need for the signatories to be able to accurately compare the reliability of various population estimators regarding total annual population estimates for the Yellowstone Segment. (3ER375). It had nothing to do with possible concerns about a threat to the Segment if the signatories adopt a new estimator without recalibration.

threatened under the ESA. *See id*. And none of them said that the possible population decrease after delisting would result in the Segment becoming threatened or endangered and in need of ESA protections. *See id*. Thus, the evidence cited by the Humane Society Appellees does not support the point they are trying to make.

B. The Best Available Science Mandate Did Not Require The Signatories To Include Recalibration Language In The Conservation Strategy.

The Humane Society Appellees next contend "[t]he record unequivocally shows that the Service also believed that the best available science required recalibration for the Conservation Strategy to be deemed adequate." (Humane Society Br., at 18). To support this argument, they rely on statements made by Service Director Ashe, Dr. Chris Servheen, and Service employee Seth Willey. (Humane Society Br., at 18-20) (citing 6JSER1223, 1235.1, 1236, 1238, 1254, 1256). In actuality, none of these individuals said the best available science mandate required the signatories to include recalibration language in the Strategy.

In separate emails, Director Ashe said that including recalibration in the Conservation Strategy was "a key commitment" and "scientifically warranted." (6JSER1235.1, 1236). In one email, he said the Service believed that recalibration was "a key commitment that must be clear in the strategy in order to ensure that the states are committed to the basic goal of maintaining the delisted population of

bears." (6JSER1235.1). Thus, he was concerned about maintaining a recovered population after delisting, not the best available science mandate. And, in a different email, his passing reference to recalibration being "scientifically warranted," without more explanation and supporting biological information, is a far throw from saying that the best available science mandate required recalibration language for the Yellowstone Segment to be delisted. (6JSER1236).

Director Ashe also told officials from three other federal agencies that the Service would not be able to go forward with delisting without a recalibration provision in the Conservation Strategy. (6JSER1238). But he did not say that the best available science mandate in the ESA precluded delisting if the Strategy did not have recalibration language. *Id*.

Dr. Servheen commented that adopting a new population estimator without recalibration "is biologically and legally indefensible." (6JSER1223 (cmt. CS1)). And, in responding to his belief that the States would manage the Yellowstone Segment population down to 600 grizzly bears, he said that such a result was "completely unacceptable and will not pass peer review or the red face test." (6JSER1254). In the same document, Dr. Servheen also said that managing the population down to 600 bears "will never pass peer review or the courts." *Id*. In a separate document, Seth Willey commented that the Service "[c]an't keep floor of 600 if population estimate doubles with new estimator." (6JSER1256).

These comments standing alone, without additional explanation or supporting biological information, are nothing more than personal opinions or preferences expressed during an intra-agency discussion early in the process of developing the 2017 delisting rule. As such, they have no legally binding effect under the ESA. *See Alfa Int'l Seafood v. Ross*, 264 F. Supp. 3d 23, 53 (D.D.C. 2017) (the personal opinion of a single agency employee made before the final rule has issued cannot supplant the agency's final position on the issue).

C. The Service Did Not Drop Its Demand For Recalibration For Political Reasons.

Echoing the district court, the Humane Society Appellees argue that the Service impermissibly agreed to adopt the model-average Chao2 estimator for the foreseeable future as a political compromise with the States. (Humane Society Br., at 22-24). At best, the evidence the Humane Society Appellees cite in support of this argument reflects nothing more than a mix of personal opinions or preferences and hearsay (sometimes double or triple hearsay). Viewed objectively, this evidence in no way establishes that the Service and the States struck a political bargain to resolve the recalibration disagreement. In fact, much of the evidence the Humane Society Appellees cite has nothing to do with the decision to adopt the model-averaged Chao2 method for the foreseeable future.

For example, they quote language in an October 12, 2016 email from Gary Fraser as evidence of political deal-making. (Humane Society Br., at 23-24)

(quoting 6JSER1241-42); *Id*. at 29 (quoting 6JSER1283-84). In this email, Fraser gave his opinion about the motives underlying recalibration language proposed by the States during the Conservation Strategy revision process. (6JSER1283-84). The Humane Society Appellees also quote language from an email authored by Director Ashe in which he referred to "state-based political concerns." (Humane Society Br., at 23) (quoting 6JSER1280). In a similar vein, they quote from three different emails that referred to the involvement of the governors of Idaho, Montana, and Wyoming in the debate over recalibration. *Id*. (quoting 6JSER1235.1; 1239; 1285).

But these emails all involved the back-and-forth between the Service and the States as they disagreed on proposed recalibration language for the Conservation Strategy. They say nothing about an agreement between the Service and the States regarding the use of the model-averaged Chao2 method for the foreseeable future.

The Humane Society Appellees also quote extensively from an email authored by Dr. Servheen in which he commented on the final group of proposed changes to the Conservation Strategy. (Humane Society Br., at 24) (quoting 6JSER1228-29). They focus on three quotes from the email, but these quotes are not evidence of a political compromise. The entire email contains Dr. Servheen's personal opinions about the proposed changes to the Conservation Strategy. As

such, the quoted language from this email is irrelevant. *See Alfa Int'l Seafood*, 264 F.Supp.3d at 53.

Finally, The Humane Society Appellees quote language from a November 16, 2016 email authored by Director Ashe in which he characterized the decision to approve the use of the model-averaged Chao2 method for the foreseeable future as "the strongest agreement we can get."[8] *Id*. (quoting 6JSER1289). The mere fact that the Service and the States may have agreed on which population estimator to use does not violate the ESA. The ESA "embodies principles of cooperative federalism." *Gibbs*, 214 F.3d at 503. It envisions that the Service will work with states to accomplish the recovery and delisting goal established by Congress in the Act. *See Greater Yellowstone Coal., Inc.*, 665 F.3d at 1024 (recognizing recovery and delisting as a "major goal" of the ESA).

Given that the States will be the ones using the population estimator after delisting, it is entirely unremarkable that the Service and the States may have agreed on what population estimator to use after delisting. This is particularly true because the States will use the best available science to estimate the size of the grizzly bear population for the foreseeable future after delisting.

---

[8] The Humane Society Appellees also contend that, in October 2016, the Service characterized the recalibration issue as "negotiated." (Humane Society Br., at 22-23) (citing 6 JSER 1273). But the administrative record document they cite in support of this statement does not include the word "negotiated" or say anything about the recalibration issue. *See* (6 JSER 1273).

The pertinent question for this Court is whether the Service's decision to approve the use of the model-averaged Chao2 method for the foreseeable future satisfies the best available science mandate. The Service has determined that it does. The Humane Society Appellees have not cited this Court to any biological or scientific evidence to show otherwise. Accordingly, this Court should defer to this finding by the Service. *See Ecology Ctr. v. Castaneda*, 574 F.3d 652, 658-59 (9th Cir. 2009) (explaining that this Court affords "considerable discretion" to federal agencies on matters requiring a high level of expertise, including what constitutes the best scientific data available).

D. The Service Was Not Legally Required To Provide A Reasoned Explanation For Its Decision To Remove The Proposed Recalibration Language From The Conservation Strategy.

The Humane Society Appellees contend that the Service did not provide an "adequate rationale" in the 2017 delisting rule for its "about face" on the recalibration issue. (Humane Society Br., at 31). They argue that the lack of an adequate rationale violates the Administrative Procedure Act because the Service was required to provide a reasoned explanation for disregarding its previous factual findings. *Id*. (citing *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 969 (9th Cir. 2015)).

The relevant rule of law from *Kake* does not apply here. In *Kake*, an *en banc* panel of this Court held that "[t]he absence of a reasoned explanation for

disregarding previous factual findings violates the [Administrative Procedure Act].” *Organized Vill. of Kake*, 795 F.3d at 969. It set aside a federal agency action under the National Environmental Policy Act because specific factual findings in a 2003 record of decision contradicted factual findings the agency made on the same topic in a 2001 record of decision. *Id*.

At most, the rule of law from *Kake* dictates that a federal agency must provide a reasoned explanation for disregarding factual findings that it made in a prior final agency action. Here, the Service included recalibration language in the draft Conservation Strategy and then removed that language from the final Strategy. (2ER147). But the draft Conservation Strategy is not a final agency action and the Service did not make any factual findings in connection with the recalibration language. As a result, the rule of law from *Kake* does not apply here.

The Humane Society Appellees appear to assert that emails authored by various Service officials and employees during the decision-making process for the 2017 delisting rule equate to agency fact finding. *See* (Humane Society Br., at 29-30) (“The record establishes that the Service viewed recalibration as essential for scientifically sound and well-articulated reasons ….”). But, as explained above, the emails reflect the personal opinions or preferences of the authors, not facts. Even if this Court considers the emails to be factual in nature, they do not qualify as a prior final agency action.

E. No Evidence In The Administrative Record Suggests That A New Population Estimator May Be Adopted Within The Foreseeable Future.

Finally, the Humane Society Appellees take issue with Wyoming's argument that the Service properly excluded recalibration from the delisting analysis for the Yellowstone Segment because a new population estimator will not be adopted within the foreseeable future. (Humane Society Br., at 34-35). They make two arguments in this regard.

First, the Humane Society Appellees say that "record evidence suggests that a change in estimator is not only foreseeable but likely." (Humane Society Br., at 34). This argument cannot be reconciled with the evidence in the administrative record.

The Humane Society Appellees apparently base this argument on their belief that the Mark-Resight method may replace the model-averaged Chao2 method in the near future because "the Interagency Grizzly Bear Study Team has actively been developing alternative estimators and anticipates changing estimators post-delisting." (Humane Society Br., at 33-34) (citing 6JSER1294; 1299; 1301). The documents they cite to support this argument were created in 2012 (6JSER 1299 and 1301) and apparently in 2015 (6JSER1294). All of them refer to the Mark-Resight method. By the time the Service adopted the 2017 delisting rule, however, it had concluded that "Mark-Resight is not the best available science because

investigations into Mark-Resight discovered that it was unable to accurately detect population trend." (2ER191).

At the time the Service issued the 2017 delisting rule, no other existing population estimator was better than the model-averaged Chao2 method for estimating the total population of the Yellowstone Segment. (2ER94; 144; 146; 191). More importantly, no evidence in the administrative record suggests that another population estimator likely will be developed within the foreseeable future, let alone one that will be better than the model-averaged Chao2 method. As a result, the Service had no legitimate biological reason to believe that a different population estimator will replace the model-averaged Chao2 method within the foreseeable future.

Second, the Humane Society Appellees fault Wyoming because it did not explain why the term "foreseeable future" as used in the Conservation Strategy should have the identical meaning given to the same term in the ESA. (Humane Society Br., at 34-35). The term should be defined consistent with the ESA because the Strategy is a by-product of the ESA.

The ESA required the Service to develop the 1993 Recovery Plan. (2ER96). In turn, the 1993 Recovery Plan required the signatories to develop the Strategy to guide the long-term maintenance and management of the Yellowstone Segment grizzly bear population after delisting. *Id*. The signatories intend for the Strategy to

provide guidance and set managements standards "to ensure continued conservation" of the grizzly bear population within the Segment after delisting and "to maintain a recovered grizzly bear population for the foreseeable future" within the Segment after delisting. (3ER225).

In the delisting context, "conservation" and "recovered" are uniquely ESA terms. Therefore, the references to "continued conservation" and "maintain a recovered grizzly bear population" confirm that signatories intend for the Strategy to help them ensure that the Yellowstone Segment will not need protection under the ESA at any point in the future. Given that the origin and purpose of the Strategy tie directly to the ESA, common sense and consistency demand that the term "foreseeable future" should have the same meaning in the Strategy as it does in the ESA.

III. THE SERVICE COMPLIED WITH THE REQUIREMENTS OF THE ESA WHEN IT DETERMINED THAT THE STATUS OF OTHER GRIZZLY BEAR POPULATIONS IN THE CONTINENTAL UNITED STATES WAS OUTSIDE THE SCOPE OF THE 2017 DELISTING RULE.

The Northern Cheyenne Tribe Appellees address two issues on behalf of all of the Appellees: the delisting analysis issue and Wyoming's related request for remand without vacatur.[9] Regarding the delisting analysis issue, they primarily

[9] The Northern Cheyenne Tribe Appellees are the Northern Cheyenne Tribe, Sierra Club, Center for Biological Diversity, and the National Parks Conservation Association.

argue that the Service's construction of the terms "species" in the 2017 delisting rule is not entitled to *Chevron* deference. (Northern Cheyenne Tribe Br., at 42-43). Regarding the request for remand without vacatur, they primarily argue that allowing the 2017 delisting rule to remain in place during the remand proceedings risks further harm to the Yellowstone Segment because the number of grizzly bears in the Segment may be reduced through recreational hunting. (Northern Cheyenne Tribe Br., at 45). They are wrong on both counts.

A. The Service Construed The ESA Definition Of Species In The 2017 Delisting Rule And Its Construction Is Entitled To *Chevron* Deference.

The Northern Cheyenne Tribe Appellees argue that this Court should not defer to the Service's construction of the ESA term "species" in the 2017 delisting rule because: (1) the Service did not definitively interpret the term in the 2017 delisting rule; and (2) the Service has conceded "that it did not consider the 'legal question of whether, when a [distinct population segment] of a listed species is delisted, the rest of the species continues to qualify as a "species" within the meaning of the [ESA].'" (Northern Cheyenne Tribe Br., at 42) (quoting Fed. Br. 22). Neither argument has merit.

The Service's supposed concession has nothing to do with whether its construction of the term "species" in the 2017 delisting rule is entitled to *Chevron* deference. In the 2017 delisting rule, the Service opined that, consistent with the

ESA, a distinct population segment may be a "species" independent of the broader listed species. (2ER98; 202-03). Admittedly, the Service's explanation of this point could have been more thorough, but the Service provided enough detail for this Court to defer to its construction under *Chevron*. *See, cf., Jayne v. Sherman*, 706 F.3d 994, 1009 (9th Cir. 2013) (a reviewing court will uphold an agency decision of "'less than ideal clarity … if the agency's path may reasonably be discerned'") (citation omitted). If this Court defers to the Service's construction, then the district court's holding on the delisting analysis issue must be reversed for the reasons explained in Wyoming's Opening Brief. (Wyo. Opening Br., at 49-50).

The Northern Cheyenne Tribe Appellees ignore the substance of Wyoming's argument regarding *Chevron* deference. Although they impugn the quality of Wyoming's argument, they do not explain why it is wrong. Instead, they redefine the question to avoid addressing Wyoming's argument on its merits. (Northern Cheyenne Tribe Br., at 42-43).

The Service's construction of "species" (as explained in the preamble to the 2017 delisting rule) and the Northern Cheyenne Tribe Appellees preferred construction (as reflected in the district court judgment) are substantively different. In the 2017 delisting rule, the Service construed the term "species" as being separable, thereby allowing it to perform a delisting analysis only for the Yellowstone Segment because the Segment is a "species" independent of the

broader species listing. This construction aligns with the congressional intent that the authority to designate a distinct population segment gives the Service the ability "to provide different levels of protection to different populations of the same species." *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 842 (9th Cir. 2003) (citations omitted).

The district court construed the term holistically, thereby requiring the Service to perform two delisting analyses – one for the Yellowstone Segment and one for the other grizzly bear populations in the continental United States – because the segment and the other populations are one "species" under the ESA. (1ER30). This construction makes the delisting of a properly designated distinct population segment conditional upon the findings of the status review for the other populations (the so-called remnant species). It thus contravenes the congressional intent of the distinct population segment language because it may prevent the Service from providing different levels of protection to different populations of the same species.

Given these differing constructions, the ultimate question for this Court is whether the Service's construction is reasonable. For the reasons explained above and in Wyoming's Opening Brief, it is. (Wyo. Opening Br., at 47-49). This Court, therefore, must defer to the Service's construction, even if it believes the district

court's construction is better. *Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1054 (9th Cir. 2010) (citation and internal quotation marks omitted).

B. Remanding The 2017 Delisting Rule Without Vacatur Will Not Result In Harm To The Yellowstone Segment.

The Northern Cheyenne Tribe Appellees contend that remanding the 2017 delisting without vacatur will risk further harm to the Yellowstone Segment due to the possibility of increased mortality, particularly due to hunting. (Northern Cheyenne Tribe Br., at 45). In support of this argument, they note that the planned (and subsequently cancelled) 2017 grizzly bear hunting seasons in Idaho and Wyoming could have resulted in "as many as 23" grizzly bear deaths. *Id*. They also point to an increase in conflict mortalities in recent years as a source of harm. *Id*.

In this context, harm cannot mean the deaths of individual grizzly bears. Individual grizzly bears in the Yellowstone Segment die annually from a variety of causes, even when the Segment is listed under the ESA. Therefore, harm must be measured in terms of the impact of the total number of grizzly bear deaths on the total population within the DMA. If the number of grizzly bear deaths that may occur during a remand without vacatur likely will not jeopardize the recovered status of the Yellowstone Segment, then those deaths cannot reasonably be considered to cause harm to the Segment.

The Northern Cheyenne Tribe Appellees say nothing about how the recent annual mortality numbers have impacted the total population within the DMA. The

recent grizzly bear deaths have in no way jeopardized the recovered status of the Segment because, despite these mortalities, the Interagency Grizzly Bear Study Team (IGBST) estimated the total population within the DMA of the Yellowstone Segment to be 709 grizzly bears,[10] far above the minimum number of bears required for the Yellowstone Segment to be recovered.

In addition, the States will manage any hunting seasons that may occur during a remand without vacatur so that the total population within the DMA will be around 674 bears. (2ER114). Thus, the Northern Cheyenne Tribe Appellees' claims of possible harm caused by a remand without vacatur cannot withstand the objective reality of the total population numbers for the Yellowstone Segment.

The Northern Cheyenne Tribe Appellees also suggest that this Court will conclude that remand without vacatur is not appropriate if it weighs the alleged shortcomings of the Service's delisting analysis against "'the disruptive consequences of an interim change that may itself be changed ….'" (Northern Cheyenne Tribe Br., at 45) (quoting *Pollinator Stewardship Council v. U.S. Envtl. Prot. Agency*, 806 F.3d 520, 532 (9th Cir. 2015)). But their argument ignores half of the rule of law from the *Pollinator Stewardship Council* case. They identify the

[10] IGBST, *2018 Annual Report Summary* (https://prd-wret.s3-us-west-2.amazonaws.com/assets/palladium/production/atoms/files/IGBST%20Summary%20Report%202018%20v1.3.pdf

alleged shortcomings of the Service's delisting analysis, but they do not say anything about the disruptive consequences that will result if this Court orders a remand without vacatur. As a result, their argument on this point fails.

IV. THE SERVICE CORRECTLY DETERMINED THAT GRIZZLY BEARS SHOULD NOT BE TRANSLOCATED INTO THE YELLOWSTONE SEGMENT UNTIL THE BEST AVAILABLE SCIENCE SHOWS THAT GENETIC HEALTH MAY POSE A THREAT TO THAT SEGMENT.

Appellee WildEarth Guardians addresses the translocation issue for all of the Appellees. (WildEarth Guardians Br., at 45-60). Wyoming generally agrees with the Services' arguments in response to WildEarth Guardians' translocation arguments, so Wyoming will not repeat similar arguments here. But Wyoming provides additional argument below to respond to two Wyoming-specific arguments made by WildEarth Guardians.

WildEarth Guardians questions Wyoming's commitment to translocation as a means to address genetic health concerns that may arise at some unknown point in the future. (WildEarth Guardians Br., at 52). In particular, WildEarth Guardians criticizes the fact that the Wyoming Grizzly Bear Management Plan provides only that Wyoming will consider translocation and only as a last resort. *Id*.

Wyoming made an explicit commitment to translocation in the Wyoming Plan. In the Plan, Wyoming stated that it will consider translocation if genetic issues become a concern in the future. (WY-SER66). This commitment to consider

translocation as a possible solution to unknown future genetic health concerns provides an appropriately measured regulatory response to an ill-defined concern.

Genetic health does not pose a current threat to the Yellowstone Segment. (2ER161). The best scientific data available says that genetic contribution from grizzly bears outside of the Segment will not be necessary for the next several decades. (2ER125). No one can say right now whether translocation will be the best means for addressing genetic health concerns in the future because no one knows exactly what those concerns might be. Accordingly, Wyoming's commitment to consider translocation if genetic health becomes a concern in the future gives Wyoming the necessary regulatory flexibility to craft the best possible solution to the specific genetic health issue that may arise.

Following the district court's lead, WildEarth Guardians also takes issue with the fact that the 2016 Conservation Strategy does not include an explicit commitment to translocation, even though the 2007 version of the Strategy had such a commitment. (WildEarth Guardians Br., at 52-53). But a federal agency may change an existing policy as long as it provides a reasoned explanation for the change. *Altera Corp. & Subsidiaries v. Comm'r of IRS*, 926 F.3d 1061, 1085 (9th Cir. 2019). If facts underlying the new policy contradict facts underlying the prior policy, the agency must explain why it disregarded the facts it previously had relied on. *Id*.

In the preamble to the 2017 delisting rule, the Service explained why it removed the explicit commitment to translocate bears into the Yellowstone Segment. *See* (2ER117) (new information regarding heterozygosity and current effective population size made the commitment to translocated bears by 2020 unnecessary). This explanation more than satisfies the reasoned explanation requirement and, as a result, WildEarth Guardians' argument on this point lacks merit.

V. WYOMING'S POST-DELISTING GRIZZLY BEAR MANAGEMENT SCHEME ACCOUNTS FOR ALL CONFLICT MORTALITY.

In addition to the addressing the three issues raised by Wyoming, the Appellees give this Court several alternative reasons why they think the district court judgment should be affirmed on other grounds appearing in the record. (WildEarth Guardians Br., at 60-80); (Northern Cheyenne Tribe Br., at 50-65); (Humane Society Br., at 45-64). Wyoming generally agrees with the Service's arguments in response to the alternative reasons, so Wyoming will not repeat similar arguments here. But Wyoming provides additional argument below to respond to the Northern Cheyenne Tribe Appellees' conflict mortality argument.

The Northern Cheyenne Tribe Appellees argue that: (1) the mortality thresholds in the Strategy "do not limit the number of bears that may be killed due to conflicts with human activities" (Northern Cheyenne Tribe Br., at 60); and (2) the state regulatory mechanisms do not require the States to halt management

removals of grizzly bears when annual mortality thresholds are met. (Northern Cheyenne Tribe Br., at 62-63). In making these arguments, the Northern Cheyenne Tribe Appellees insinuate that unregulated conflict mortality eventually will cause the Yellowstone Segment to once again become threatened. Both arguments lack merit, however, because the States will account for all conflict mortality when they determine how much discretionary mortality will be allowed in a given year.

The Conservation Strategy provides as follows regarding the post-delisting management of conflict mortality:

> It is recognized that established mortality limits might be exceeded in any given year. Any mortality threshold will not affect the immediate management of bears for human safety concerns or for management of conflict grizzly bears. **Appendix O describes agency responsibilities and actions to reduce mortality should this occur.** State plans provide for the take of conflict bears regardless of the current mortality quota upon consultation among all involved agencies.

(3ER271) (emphasis added). Appendix O in the Strategy is the Tri-State Agreement that addresses the management of discretionary mortality in the Yellowstone Segment. (WY-FER74-86). The Tri-State Agreement has been adopted by reference into the Wyoming grizzly bear management regulation. (WY-FER70-73).

The Strategy says that exceeding a specific mortality threshold will not affect the management of conflict mortality in the present year. (3ER271). But that does not mean that conflict mortality is unregulated. The Tri-State Agreement

requires the States to account for all excess mortality for each of the specific sex and age-based annual mortality limits that occurred during the past year when determining the amount of discretionary mortality to be allowed for that threshold in the current year. (WY-FER78 (§ 4(a), 4th bullet point)). Therefore, if a state authorizes conflict mortality for a particular sex and age-based mortality limit after that limit is met, the total amount of that excess mortality will be offset the next year by reducing the amount of allowable mortality for that mortality limit. *Id*. Table 4 in the preamble to the 2017 delisting rules provides a numerical example of how the States will account for such mortality. (2ER114 (Table 4)).

The Northern Cheyenne Tribe Appellees do not address the substance of the Tri-State Agreement in their conflict mortality arguments. Instead, they claim that the Wyoming grizzly bear management regulation only "offer[s] general assurances to 'coordinate management' pursuant to the [Tri-State Agreement]." (Northern Cheyenne Tribe Br., at 63) (quoting JSER 0901). But they ignore the immediately following subsection in the Wyoming regulation which provides that the Tri-State Agreement "establishes that the [S]tates shall meet annually to evaluate annual population estimation and mortality in order **to derive total mortality**." (WY-FER71)(ch. 67, § 4(l)) (emphasis added). And, as explained above, the Tri-State Agreement requires the States to account for all conflict

mortality. Thus, the Northern Cheyenne Tribe Appellees' conflict mortality arguments fall flat.

VI. ALAND'S CROSS-APPEAL ARGUMENTS LACK MERIT FACTUALLY AND LEGALLY.

In his opening brief, Cross-Appellant Aland raises six issues and arguments that he characterizes as being separate from the arguments of the Appellees. Wyoming generally agrees with the Services arguments in response to Aland's arguments, so Wyoming will not repeat similar arguments here.

[Intentionally Left Blank]

CONCLUSION

For the foregoing reasons, the State of Wyoming respectfully requests that this Court reverse the district court's holdings on the issues raised in this appeal and reinstate the 2017 delisting rule for the Yellowstone Segment. Alternatively, if this Court agrees with the district court on the delisting analysis issue, Wyoming respectfully asks this Court to reinstate the 2017 delisting rule and to leave that rule in place while the Service completes the remand process.

Date: October 18, 2019

Office of the Wyoming Attorney General

/s/ Jay A. Jerde
Jay A. Jerde
Special Assistant Attorney General
Erik E. Petersen
Senior Assistant Attorney General
2320 Capitol Avenue
Cheyenne, WY 82002
(307) 777-7895 (phone)
jay.jerde@wyo.gov

Attorneys for State of Wyoming

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 18-36030

I am the attorney or self-represented party.

This brief contains 12,622 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ◉ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ○ is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ○ it is a joint brief submitted by separately represented parties;
  - ○ a party or parties are filing a single brief in response to multiple briefs; or
  - ○ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated _____.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Jay A. Jerde **Date** Oct 18, 2019

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I certify that I served the foregoing brief on this date by United States mail, first class, postage prepaid, to the following unregistered case participant:

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

Date: October 18, 2019

Office of the Wyoming Attorney General

/s/ Jay A. Jerde
Jay A. Jerde
Special Assistant Attorney General

Attorney for Appellant State of Wyoming

ATTACHMENT

Brian R. Nesvik Declaration

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

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

v.

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

and

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

DECLARATION OF BRIAN R. NESVIK

I, Brian R. Nesvik, declare as follows:

1. I am over 18 years of age. I have personal knowledge of the matters set forth in this declaration.

2. I earned a Bachelor of Science degree in wildlife and fisheries biology and management from the University of Wyoming in 1994.

3. I have worked for the Wyoming Game and Fish Department continuously since May 1995.

4. Currently, I am the Director of the Department.

5. Before I was appointed as the Director of the Department, I was the Division Chief for the Wildlife Division of the Department.

6. In my capacity as Division Chief, I participated in the administrative processes that resulted in the 2017 federal rule to establish the Greater Yellowstone Ecosystem Grizzly Bear Distinct Population Segment (Yellowstone Segment) and to remove the Yellowstone Segment from the list of endangered and threatened species.

7. During the development of the rule to delist the Yellowstone Segment, the Department took several actions to satisfy the legal requirements for delisting under the Endangered Species Act, including:

- Promulgating an administrative regulation to govern grizzly bear management in Wyoming after delisting (Chapter 67);
- Revising the Wyoming Grizzly Bear Management Plan; and
- Entering into a memorandum of agreement with the States of Idaho and Montana to address how discretionary mortality of grizzly bears in the Yellowstone Segment will be managed after delisting.

8. During the process to promulgate the administrative rule to govern grizzly bear management after delisting, the Department held six public meetings at locations throughout Wyoming.

9. The Department devoted a significant amount of resources to the process of promulgating the grizzly bear management regulation. For example:

- Department employees drafted the proposed regulation that was published for public comment;
- Department employees coordinated with employees of the United States Fish and Wildlife Service to ensure that the content of the regulation satisfied the Service's requirements for delisting;
- Department employees attended each of the public meetings on the draft regulation; and,
- Department employees reviewed the written comments the Department received regarding the draft regulation, summarized the comments, and presented the summary to the Wyoming Game and Fish Commission.

10. During the process to revise the Wyoming Grizzly Bear Management Plan, the Department held eight public meetings at locations throughout Wyoming.

11. The Department devoted a significant amount of resources to the process of revising the grizzly bear management plan. For example:

- Department employees drafted the proposed revisions for the plan;

- Department employees coordinated with employees of the Service to ensure that the content of the proposed revisions satisfied the Service's requirements for delisting;
- Department employees attended each of the public meetings on the proposed revisions to the plan; and,
- Department employees reviewed the written comments the Department received regarding the proposed revisions to the plan, summarized the comments, and presented the summary to the Commission.

12. In 2016, I worked with wildlife management officials from the states of Idaho and Montana to develop a Memorandum of Agreement Regarding the Management and Allocation of Discretionary Mortality of Grizzly Bears in the Greater Yellowstone Ecosystem (Tri-State Agreement). During this process, we met several times to discuss what topics the Tri-State Agreement should address and how best to address those topics in the agreement.

13. In 2016, I was the Wyoming representative on the Yellowstone Ecosystem (Y.E.S.) Subcommittee of the Interagency Grizzly Bear Committee. In that role, I participated in several meetings where the Y.E.S. Subcommittee considered, discussed, and approved revisions to the Conservation Strategy.

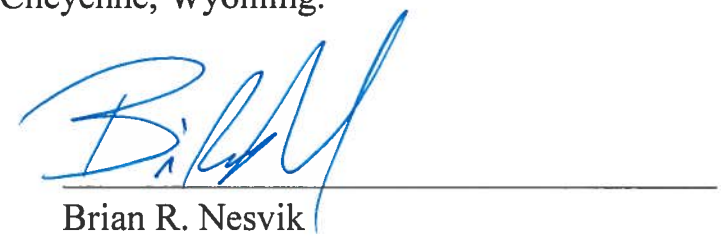
14. As the Wyoming representative on the Y.E.S. Subcommittee, I was the chairman of the Y.E.S. Conservation Strategy Revision Steering Committee.

As the chairman of the Steering Committee, I participated in several meetings where the Committee considered and discussed possible revisions to the Conservation Strategy.

15. When the grizzly bear population in Wyoming is listed under the Endangered Species Act, the Department must obtain approval from the Service before it may trap, relocate, or lethally remove a grizzly bear in areas subject to the Department's wildlife management jurisdiction.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 16, 2019, in Cheyenne, Wyoming.



Brian R. Nesvik

ADDENDUM

Except for the following, all applicable statutes, are contained in the brief or addendum of the Federal Appellants.

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 383.)

§ 1540. Penalties and enforcement

(g) Citizen suits

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)(A) No action may be commenced under subparagraph (1)(A) of this section—

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section—

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section 1535(g)(2)(B)(ii) of this title to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

(3)(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).

§ 17.40 Special rules—mammals.

(a) [Reserved]

(b) Grizzly bear (*Ursus arctos horribilis*)—(1) *Prohibitions.* The following prohibitions apply to the grizzly bear:

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

(B) Grizzly bears may be taken in self-defense or in defense of others, but such taking shall be reported, within 5 days of occurrence, to the Assistant Regional Director, Division of Law Enforcement, U.S. Fish and Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, Colorado 80225 (303/236–7540 or FTS 776–7540), if occurring in Montana or Wyoming, or to the Assistant Regional Director, Division of Law Enforcement, U.S. Fish and Wildlife Service, Lloyd 500 Building, Suite 1490, 500 Northeast Multnomah Street, Portland, Oregon 97232 (503/231–6125 or FTS 429–6125), if occurring in Idaho or Washington, and to appropriate State and Indian Reservation Tribal authorities. Grizzly bears or their parts taken in self-defense or in defense of others shall not be possessed, delivered, carried, transported, shipped, exported, received, or sold, except by Federal, State, or Tribal authorities.

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

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

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

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

(D) *Federal, State, or Tribal scientific or research activities.* Federal, State, or Tribal authorities may take grizzly bears for scientific or research purposes, but only if such taking does not result in death or permanent injury to the bears involved. Such taking must be reported within 5 days of occurrence to the appropriate Assistant Regional Director, Division of Law Enforcement, U.S. Fish and Wildlife Service, as indicated in paragraph (b)(1)(i)(B) of this section, and to appropriate State and Tribal authorities.

(E) [Reserved]

(F) *National Parks.* The regulations of the National Park Service shall govern all taking of grizzly bears in National Parks.

(ii) *Unlawfully taken grizzly bears.* (A) Except as provided in paragraphs (b)(1)(ii)(B) and (iv) of this section, no person shall possess, deliver, carry, transport, ship, export, receive, or sell any unlawfully taken grizzly bear. Any unlawful taking of a grizzly bear shall be reported within 5 days of occurrence to the appropriate Assistant Regional Director, Division of Law Enforcement, U.S. Fish and Wildlife Service, as indicated in paragraph (b)(1)(i)(B) of this section, and to appropriate State and Tribal authorities.

(B) Authorized Federal, State, or Tribal employees, when acting in the course of their official duties, may, for scientific or research purposes, possess, deliver, carry, transport, ship, export, or receive unlawfully taken grizzly bears.

(iii) *Import or export.* Except as provided in paragraphs (b)(1)(iii) (A) and (B) and (iv) of this section, no person shall import any grizzly bear into the United States.

(A) *Federal, State, or Tribal scientific or research activities.* Federal, State, or Tribal authorities may import grizzly bears into the United States for scientific or research purposes.

(B) *Public zoological institution.* Public zoological institutions (see 50 CFR 10.12) may import grizzly bears into the United States.

(iv) *Commercial transactions.* (A) Except as provided in paragraph (b)(1)(iv)(B) of this section, no person shall, in the course of commercial activity, deliver, receive, carry, transport, or ship in interstate or foreign commerce any grizzly bear.

(B) A public zoological institution (see 50 CFR 10.12) dealing with other public zoological institutions may sell grizzly bears or offer them for sale in interstate or foreign commerce, and may, in the course of commercial activity, deliver, receive, carry, transport, or ship grizzly bears in interstate or foreign commerce.

(v) *Other violations.* No person shall attempt to commit, cause to be committed, or solicit another to commit any act prohibited by paragraph (b)(1) of this section.

(2) *Definitions.* As used in paragraph (b) of this section:

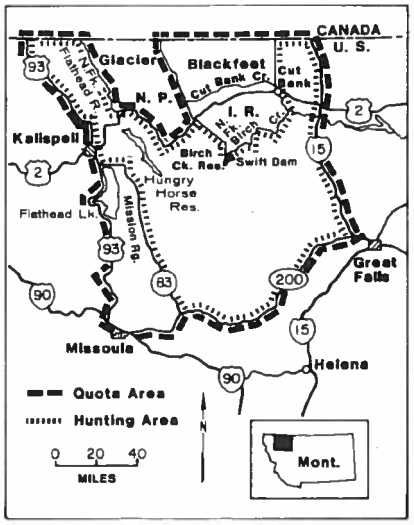
Grizzly bear means any member of the species *Ursus arctos horribilis* of the 48 conterminous States of the United States, including any part, offspring, dead body, part of a dead body, or product of such species.

Grizzly bear accompanied by young means any grizzly bear having offspring, including one or more cubs, yearlings, or 2-year-olds, in its immediate vicinity.

Identified means permanently marked or documented so as to be identifiable by law enforcement officials at a subsequent date.

State, Federal or Tribal authority means an employee of State, Federal, or Indian Tribal government who, as part of his/her official duties, normally handles grizzly bears.

Young grizzly bear means a cub, yearling, or 2-year-old grizzly bear.



§ 424.14 Petitions.

(a) *General.* Any interested person may submit a written petition to the Secretary requesting that one of the

actions described in §424.10 be taken. Such a document must clearly identify itself as a petition and be dated. It must contain the name, signature, address, telephone number, if any, and the association, institution, or business affiliation, if any, of the petitioner. The Secretary shall acknowledge in writing receipt of such a petition within 30 days.

(b) *Petitions to list, delist, or reclassify species.* (1) To the maximum extent practicable, within 90 days of receiving a petition to list, delist, or reclassify a species, the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. For the purposes of this section, "substantial information" is that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted. The Secretary shall promptly publish such finding in the FEDERAL REGISTER and so notify the petitioner.

(2) In making a finding under paragraph (b)(1) of this section, the Secretary shall consider whether such petition—

(i) Clearly indicates the administrative measure recommended and gives the scientific and any common name of the species involved;

(ii) Contains detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species involved and any threats faced by the species;

(iii) Provides information regarding the status of the species over all or a significant portion of its range; and

(iv) Is accompanied by appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps.

The petitioner may provide information that describes any recommended critical habitat as to boundaries and physical features, and indicates any benefits and/or adverse effects on the species that would result from such designation. Such information, however, will not be a basis for the determination of the substantiality of a petition.

(3) Upon making a positive finding under paragraph (b)(1) of this section, the Secretary shall commence a review of the status of the species concerned and shall make, within 12 months of receipt of such petition, one of the following findings:

(i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the FEDERAL REGISTER and so notify the petitioner.

(ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the FEDERAL REGISTER a proposed regulation to implement the action pursuant to §424.16 of this part, or

(iii) The petitioned action is warranted, but that—

(A) The immediate proposal and timely promulgation of a regulation to implement the petitioned action is precluded because of other pending proposals to list, delist, or reclassify species, and

(B) Expeditious progress is being made to list, delist, or reclassify qualified species,

in which case, such finding shall be promptly published in the FEDERAL REGISTER together with a description and evaluation of the reasons and data on which the finding is based.

(4) If a finding is made under paragraph (b)(3)(iii) of this section with regard to any petition, the Secretary shall, within 12 months of such finding, again make one of the findings described in paragraph (b)(3) with regard to such petition, but no further finding of substantial information will be required.

(c) *Petitions to revise critical habitat.* (1) To the maximum extent practicable, within 90 days of receiving a petition to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scienific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the FEDERAL REGISTER and so notify the petitioner.

(2) In making the finding required by paragraph (c)(1) of this section, the

Secretary shall consider whether a petition contains—

(i) Information indicating that areas petitioned to be added to critical habitat contain physical and biological features essential to, and that may require special management to provide for, the conservation of the species involved; or

(ii) Information indicating that areas designated as critical habitat do not contain resources essential to, or do not require special management to provide for, the conservation of the species involved.

(3) Within 12 months after receiving a petition found under paragraph (c)(1) of this section to present substantial information indicating that revision of a critical habitat may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the FEDERAL REGISTER.

(d) *Petitions to designate critical habitat or adopt special rules.* Upon receiving a petition to designate critical habitat or to adopt a special rule to provide for the conservation of a species, the Secretary shall promptly conduct a review in accordance with the Administrative Procedure Act (5 U.S.C. 553) and applicable Departmental regulations, and take appropriate action.

TITLE 23 - GAME AND FISH

CHAPTER 1 - ADMINISTRATION

ARTICLE 1 - GENERAL PROVISIONS

23-1-103. Ownership of wildlife; purpose of provisions.

For the purpose of this act, all wildlife in Wyoming is the property of the state. It is the purpose of this act and the policy of the state to provide an adequate and flexible system for control, propagation, management, protection and regulation of all Wyoming wildlife. There shall be no private ownership of live animals classified in this act as big or trophy game animals or of any wolf or wolf hybrid.

TITLE 23 - GAME AND FISH

CHAPTER 1 - ADMINISTRATION

ARTICLE 3 - GENERAL POWERS AND DUTIES OF THE COMMISSION

23-1-302. Powers and duties.

(a) The commission is directed and empowered:

(vi) To capture, propagate, transport, buy, sell, or exchange any species of game animal, bird, fish, fish eggs, or furbearing animal needed for propagation or stocking purposes, and to exercise control over undesirable species and protected species;

(vii) To direct the capture of any of the wildlife of Wyoming in localities where species are abundant and to transport and distribute any wildlife as in the judgment of the commission is for the best interests of Wyoming;

TITLE 23 - GAME AND FISH

CHAPTER 1 - ADMINISTRATION

ARTICLE 10 - GRIZZLY BEAR RELOCATION

23-1-1001. Grizzly bear relocation.

(a) Upon relocating a grizzly bear or upon receiving notification that a grizzly bear is being relocated, the department shall provide notification to the county sheriff of the county to which the bear is relocated within five (5) days of each grizzly bear relocation and shall issue a press release to the media and sheriff in the county where each grizzly bear is relocated.

(b) The notice and press release shall provide the following information:

(i) The date of the grizzly bear relocation;

(ii) The number of grizzly bears relocated; and

(iii) The location of the grizzly bear relocation, as provided by commission rule and regulation.

(c) No later than January 15 of each year the department shall submit an annual report to the joint travel, recreation, wildlife and cultural resources interim committee. The annual report shall include the total number and relocation area of each grizzly bear relocated during the previous calendar year. The department shall also make available the annual report to the public.