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Defendant-Intervenor

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION**

CROW INDIAN TRIBE; et al.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA; et al.

Federal-Defendants,

and

STATE OF WYOMING,

Defendant-Intervenor.

CV 17-89-M-DLC

(Consolidated with Case Nos.
CV-17-117-M-DLC,
CV-17-118-M-DLC,
CV-17-119-M-DLC,
and CV-17-123-M-DLC)

**MONTANA'S REPLY BRIEF IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

Defendant Intervenors State of Montana and the Montana Department of Fish, Wildlife and Parks (collectively “Montana”) submit the following Reply Brief in Support of Motion for Summary Judgment.

I. INTRODUCTION

In 1975, when the grizzly bear was listed as threatened in the 48 contiguous states, it deserved the protection of the Endangered Species Act. 16 U.S.C. §§ 1531-1540 (“ESA”). When listed, estimates of the Yellowstone region population ranged from 136 to 312 individuals. 82 Fed. Reg. 30508 (FWS_Rel Docs_001441). In 1982, when Defendant United States Fish and Wildlife Service (“FWS”) completed the initial Grizzly Bear Recovery Plan (“recovery plan”), the Greater Yellowstone area was one of only six areas left in the 48 states thought to support grizzly bears. In contrast, in 2015, after over 35 years of recovery effort on the part of states, federal agencies and a variety of partners, the estimated population in what is now the Yellowstone Region Distinct Population Segment (“Yellowstone grizzly segment”) was 717 grizzly bears. 82 Fed. Reg. 30533 (FWS_Rel Docs_001466).

In the 1993 revisions to the recovery plan, FWS announced its intent to delist individual populations of grizzly bears as they are recovered. 82 Fed. Reg. 30517 (FWS_Rel Docs_001450), *See also*, FWS_LIT_014558. Now that the ESA has worked to protect and recover the Yellowstone grizzly segment, Montana

supports its delisting and the return of long-term management to the states of Montana, Idaho, and Wyoming.

In its Brief in Support (Doc. 203), Federal Defendants have capably addressed all of Plaintiffs' arguments. Montana adopted Federal Defendants' arguments in its response brief. Doc. 218 at 2. Similarly, Montana hereby adopts Federal Defendants' arguments in this Reply Brief. Here, Montana reinforces its argument that in Montana, regulatory mechanisms are adequate to ensure the continued recovered status of the Yellowstone grizzly segment. Additionally, Montana shows that FWS' analysis of the cumulative impact of various threats to the Yellowstone grizzly segment was legally sufficient.

II. ARGUMENT

In addition to arguments made by Federal Defendants, Montana is entitled to summary judgment in its favor for the following reasons.

A. FWS' analysis of regulatory mechanisms, both inside and outside the Demographic Monitoring Area, was not arbitrary.

ESA requires FWS to consider five factors in determining whether a species is threatened or endangered, including whether regulatory mechanisms are inadequate to protect the species. 16 U.S.C. § 1533(a)(1). In its final rule where it removed the Greater Yellowstone Ecosystem population of grizzly bears from the list of endangered and threatened species ("2017 Final Rule") (82 Fed. Reg. 30502, June 30, 2017 (FWS_Rel Docs_001435)), FWS thoroughly analyzed existing

regulatory mechanisms, along with other factors, and drew the rational conclusion that, based on the best available information and on continuation of current regulatory commitment, there is no regulatory inadequacy that constitutes a threat to the Yellowstone grizzly segment, now or in the foreseeable future. 82 Fed. Reg. 30535 (FWS_Rel Docs_001468). FWS cited various regulatory mechanisms throughout the 2017 Final Rule. Its approach was to consider the relevant regulatory mechanisms when evaluating other listing/delisting factors. For example, under its consideration of Factor A, the present or threatened destruction, modification, or curtailment of habitat or range, FWS notes that since 1986, National Forest and National Park plans have incorporated the Interagency Grizzly Bear Guidelines to manage grizzly bear habitat in the Yellowstone Primary Conservation Area (“conservation area”). These included standards for motorized access, livestock allotments, recreation, snowmobiling, and vegetation management. 82 Fed. Reg. 30521-30524 (FWS_Rel Docs_001454-001457). FWS considered Factors B, overutilization for commercial, recreational, scientific or educational purposes, and C, disease or predation, together. There, FWS thoroughly discussed human caused mortality, including the various regulatory mechanisms of the three states that address it. 82 Fed. Reg. 30527-30531 (FWS_Rel Docs_001460-001464). It also analyzes the framework for mortality management inside a Demographic Monitoring Area (“monitoring area”), and the

Tri-State Memorandum of Agreement (FWS_Rel Docs_001293-001305) (“Tri-State MOA”) which governs the allocation of discretionary mortality between the States of Montana, Wyoming and Idaho and has been signed by all three states. 82 Fed. Reg. 30531-30534 (FWS_Rel Docs_001464-001467).

Plaintiff Humane Society complains that FWS failed to account for regulatory mechanisms outside the monitoring area and takes issue with the fact that there are different levels of protection for grizzly bears within the Yellowstone grizzly segment. Doc. 227 at 13-15. Plaintiffs further complain that reliance on suitable habitat within the monitoring area as a basis to “disregard” the status of bears outside the monitoring area ignores that bears inside and out are members of a single contiguous population. *Id.* at 14. But Plaintiffs blatantly disregard the value of the comprehensive post-delisting management scheme for the Yellowstone grizzly segment; i.e., the Conservation Strategy and its appendices, including Montana, Idaho and Wyoming’s grizzly bear management plans, which consider management outside the monitoring area. The Conservation Strategy delineates a conservation area which is comprised of the former Recovery Zone. It is a core secure area for grizzly bears, where human impacts on habitat conditions will be maintained. 82 Fed. Reg. 30521 (FWS_Rel Docs_001454). The monitoring area includes the conservation area plus almost all of the remaining suitable habitat in the Yellowstone region. 82 Fed. Reg. 30504, 30512 (FWS_Rel Docs_001437,

001445). There, the grizzly population is annually surveyed and estimated, and mortality limits are applied. Mortality (whether natural or human-caused, including hunting) must be limited to that level that would enable the population standards to be met.

Humane Society, in arguing that bears must be recovered throughout the entire Yellowstone grizzly segment before they can be delisted, further disregards that under FWS' Distinct Population Segment Policy, an artificial or human-made boundary may be used to clearly identify the geographic area included within a distinct population segment designation. 82 Fed. Reg. 30517 (FWS_Rel Docs_001450). That is what occurred with the Yellowstone grizzly segment. As a result, the Yellowstone grizzly segment, as a geographic area rather than a population, contains a substantial amount of land that is not suitable grizzly habitat.

FWS found that bears in areas peripheral to the monitoring area will not establish self-sustaining year-round populations due to a lack of suitable habitat, land ownership patterns, and lack of traditional, natural grizzly bear foods. *See*, 82 Fed. Reg. 30510 (FWS_Rel Docs_001443). Therefore, FWS concluded that grizzly bears in these areas are not biologically necessary to the Yellowstone region population and a lack of occupancy outside the monitoring area boundaries will not affect whether the Yellowstone region population is likely to become endangered

or threatened in the foreseeable future throughout all or a significant portion of its range. As a result, FWS found that grizzly bear recovery in these portions of the monitoring area is unnecessary because there is more than enough suitable habitat within the monitoring area to support a viable and recovered grizzly bear population as set forth in the demographic recovery criteria. Therefore, additional recovery efforts in these areas are beyond what is required by the ESA. 82 Fed. Reg. 30511 (FWP_Rel Docs_001444). That does not mean, however, that there are no regulatory protections or conservation measures for bears outside the monitoring area. They are provided by state statutes, administrative rules, hunting regulations, and management plans.

FWS utilized man-made features such as highways in delineating the geographic extent of the Yellowstone grizzly segment. If, having done so, bears had to occupy the entire monitoring area, then the current Yellowstone grizzly segment couldn't be delisted until grizzly bears inhabited the City of Bozeman and other unsuitable habitats. If this were the case, FWS would be forced to set distinct population segment boundaries at the outer limits of species' current range, leaving absolutely no unoccupied habitat. This would not only make it very difficult to accurately delineate a segment, but if the tables were turned, and a population were being listed, it would mean there would be no room for that distinct population to

grow into any area in which it is protected, which would not be consistent with ESA's goal to recover threatened and endangered species.

Humane Society refers to the brief of Plaintiff Alliance for the Wild Rockies ("Alliance") (Doc. 192) to support its assertion that bears must be equally protected both inside and outside the monitoring area, but does not cite a specific page or section of Alliance's brief. Alliance's brief centers on FWS' alleged failure to evaluate grizzly's lost historic range. To the extent that Humane Society is making a significant portion of range argument, this issue was recently laid to rest by the 9th Circuit which upheld the Service's policy that the term "significant portion of a species' range" applies to currently occupied range. *Center for Biological Diversity v. Zinke*, 9th Cir. No. 16-35886 (2018).

In the 2017 Final Rule, FWS considered all factors relevant to the five 16 U.S.C. § 1533(a)(1) listing/delisting factors, thoroughly examined the Conservation Strategy, and habitat and population standards and their enforcement. It clearly articulated a rational connection between its consideration of the various factors and its conclusion that the Yellowstone grizzly segment is no longer threatened. That is all that is required. *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 954 (9th Cir. 2003). The Court should defer to FWS' decision and grant Defendants' motions for summary judgment.

B. Montana’s regulatory mechanisms are adequate to protect the grizzly bear in the Montana portion of the Yellowstone region both within and outside the monitoring area.

In evaluating state regulatory mechanisms, FWS explicitly relies on the Grizzly Bear Management Plan for Southwestern Montana (“Montana Plan”) (FWS_LIT_033304 *et seq.*), the Montana hunting regulations for the grizzly bear, and the Montana Fish and Wildlife Commission’s approval of the Tri-State MOA (July 13, 2016). FWS also relied on the Conservation Strategy, which describes state regulatory mechanisms that provide authority to control grizzly bear mortality, control hunters, manage grizzly bear-human conflicts, and other management activities. FWS_Rel Docs_002391-002392. Appendix G to the Conservation Strategy lists regulatory mechanism and evaluates each for its applicability to the five listing/delisting factors. There are twenty-five entries for Montana including its constitution, statutes and administrative rules that provide management authority, licensing rules and restrictions, and protection from non-licensed hunting. All of these regulatory mechanisms apply within and outside of the monitoring area.

Humane Society asserts that regulatory mechanisms completely ignore grizzly bears living outside the monitoring area complaining, for example, that states are “free to kill an unrestricted number of grizzlies without any implication for annual mortality thresholds”. Doc. 227 at 13. It is true that in areas of the

Yellowstone grizzly segment outside the monitoring area States and Tribes may establish hunting seasons independent of the total mortality limits inside the monitoring area. 82 Fed. Reg. 30533 (FWS_Rel Docs_001466) Plaintiff's statement, however, is patently untrue in the State of Montana. As FWS notes, the State of Montana will manage discretionary mortality outside the monitoring area to retain the opportunity for natural movements of bears between the Greater Yellowstone and Northern Continental Divide Ecosystems. 82 Fed. Reg. 30533 (FWS_Rel Docs_001466), *see also*, Montana Plan (FWS_LIT_033304 *et seq.*).

In Montana, no grizzly bear hunting will take place in 2018 and there are no current plans for a 2019 hunt. However, in February of 2016 Montana's Fish and Wildlife Commission adopted Montana Grizzly Bear Hunting Regulations that establish a framework for hunting grizzly bears in Montana post-delisting. *See*, FWS_LIT_009397-009408. In Montana, the number of licenses issued, for both male and female bears conform to its allocation under the adopted Tri-State MOA. Montana has delineated seven bear management units covering its entire portion of the Yellowstone grizzly segment. A licensed hunter may hunt in any open bear management unit. These units basically run from north to south, thus they include land within the Yellowstone grizzly segment but outside the monitoring area. FWS_LIT_009401. The hunting regulations not only treat lands within and outside the monitoring area the same, they do not add to the number of licenses beyond the

allocation in the Tri-State MOA – which is derived from the monitoring area.

Thus, under this conservative approach there is no additional hunting of bears that may be on the northern end of the Yellowstone grizzly segment and poised to contribute to connectivity with the Northern Continental Divide Ecosystem.

Importantly, once the female allocation is met, all further hunting stops for the year, in all open bear management units. FWS_LIT_009400. Combined with other regulatory mechanisms, Montana's grizzly bear hunting regulations and Montana Plan clearly demonstrate its commitment to not only maintaining a recovered Yellowstone region grizzly population but to the opportunity for its expansion and connection to other grizzly populations.

C. FWS analyzed the cumulative effects of various threats to the Yellowstone grizzly segment and rationally concluded they do not pose a threat in the foreseeable future.

As discussed in Montana's Brief in Support, FWS analyzed the cumulative effects of various threats to the Yellowstone grizzly segment. *See*, 82 Fed. Reg. 30544-30545 (FWS_Rel Docs_001477-001478). Plaintiff Wild Earth Guardians contends that FWS failed to analyze the cumulative threats facing the Yellowstone grizzly segment. Doc. 224 at 27-29. But FWS acknowledges that the principle threats, which it had thoroughly assessed, may cumulatively impact the Yellowstone grizzly segment beyond the scope of each individual threat. Using the effects of the loss of whitebark pine, increasing human populations, and climate

change as examples, FWS concluded that today these stressors have been adequately minimized and ameliorated and do not impact the Yellowstone grizzly segment with the same intensity. 82 Fed. Reg. 30544-30545 (FWS_Rel Docs_001477-001478). It also acknowledges that future threats such as expected increases in human populations and climate change have the potential to increase grizzly bear conflicts and human-caused mortality. However, FWS noted that if factors that cumulatively acted to reduce range and abundance are minimized and ameliorated, large carnivore populations such as the grizzly bear can be conserved. 82 Fed. Reg. 30544 (FWS_Rel Docs_001477). As such, FWS did not fail to consider an important aspect of the problem when it analyzed the listing/delisting factors. *Rocky Mt. Wild v. U.S. Fish & Wildlife Serv.*, 2014 U.S. Dist. LEXIS 177042 at 21.

FWS did rely on the “relatively constant” population trend, using estimates of population trend to be the “ultimate metric to assess cumulative impacts to the population.” 82 Fed. Reg. 30544 (FWS_Rel Docs_001477). It’s use of population stability as a proxy for the impact of multiple stressors was explained as including total mortality, changes in habitat quality, changes in population density, change in current range, and displacement effects. 82 Fed. Reg. 30545 (FWS_Rel Docs_001478). Plaintiffs quibble that the use of a proxy is only acceptable if the results mirror reality. Doc. 186 at 32. FWS is aware of the reality faced by grizzly

bears. The 2017 Final Rule provides an exhaustive discussion of various threats, some of which are analyzed in combination with others and concludes “there will always be stressors acting on the GYE grizzly bear population that lead to human-caused mortality or displacement, but if these are not causing the population to decline, we cannot consider them substantial.” 82 Fed. Reg. 30545 (FWS_Rel Docs_001478). Given that the Yellowstone region grizzly population has at least doubled, and possibly even tripled, since listing thanks to a comprehensive approach to managing multiple threats, FWS’ reliance on population as the ultimate metric to address impacts to the population, whether cumulative or not, cannot simply be dismissed.

FWS analyzed cumulative impacts of various stressors and rationally concluded that they were not a threat. That is all that is required. Moreover, the entire approach to recovery of the Yellowstone region grizzly population has been one of identifying various threats to the bear and ameliorating those threats. The bears’ population increase shows that recovery efforts have been successful.

III. CONCLUSION

Prior to the 2017 Final Rule taking effect, grizzly bears in the Yellowstone region were listed as threatened. By definition, that means they were likely to become a species in danger of extinction in the foreseeable future. The 2017 Final Rule demonstrates a rational basis and reasoned explanation for FWS’ conclusion

that the Yellowstone grizzly segment is not likely to be in danger of extinction within the foreseeable future. It is based on over thirty years of effort to recover the grizzly bear in the Yellowstone region. A comprehensive Conservation Strategy provides for future habitat management, population standards and mortality limits, management and monitoring of conflicts between humans and grizzly bears, information and education efforts and more. Discretionary mortality, including hunting, is conservatively allocated amongst the States. State regulatory mechanisms exist to protect the recovered population, and Montana is committed to maintaining a robust population of grizzly bears in the Yellowstone grizzly segment and the possibility of connection to the Northern Continental Divide Ecosystem. For the foregoing reasons, the 2017 Final Rule should be upheld, and summary judgment granted in favor of Defendants.

Dated this 22nd day of August 2018.

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