Adrian A. Miller
Sullivan Miller Law
3860 Avenue B
Suite C East
Billings, MT 59102
(406) 403-7066 (phone)
adrian.miller@sullivanmiller.com

Erik E. Petersen, WSB No. 7-5608
D. David DeWald, WSB No. 7-5538
Senior Assistant Attorneys General
Wyoming Attorney General's Office
2320 Capitol Avenue
Cheyenne, WY 82002
(307) 777-6946 (phone)
(307) 777-3542 (fax)
erik.petersen@wyo.gov
david.dewald@wyo.gov

Attorneys for the State of Wyoming

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

CROW INDIAN TRIBE, CROW CREEK SIOUX TRIBE, STANDING ROCK SIOUX TRIBE, LOWER BRULE SIOUX TRIBE, PONCA TRIBE OF NEBRASKA, PIIKANI NATION, THE CRAZY DOG SOCIETY, HOPI NATIONAL BEAR CLAN, NORTHERN ARAPAHO ELDERS SOCIETY, DAVID BEARSHIELD, KENNY BOWEKATY, LLEVANDO FISHER, ELISE GROUND, ARVOL LOOKING HORSE, TRAVIS PLAITED HAIR, JIMMY ST. GODDARD, PETE STANDING ALONE, NOLAN YELLOW KIDNEY, and GARY DORR,	CV 17-89-M-DLC (Lead Case); Consolidated with Case Nos: CV 17-117-M-DLC, CV 17-118-M-DLC, CV 17-119-M-DLC, CV 17-123-M-DLC, CV 18-16-M-DLC

Plaintiffs,

v.

UNITED STATES OF AMERICA, and RYAN ZINKE, Secretary, United States Department of the Interior, and the UNITED STATES DEPARTMENT OF INTERIOR, and GREG SHEEHAN, Acting Director, United States Fish and Wildlife Service, or his Successor in Office, and the UNITED STATES FISH AND WILDLIFE SERVICE, and HILLARY COOLEY, Grizzly Bear Recovery Coordinator,

Federal Defendants,

STATE OF WYOMING, STATE OF IDAHO, STATE OF MONTANA, SAFARI CLUB INTERNATIONAL and NATIONAL RIFLE ASSOCIATION OF AMERICA, SPORTSMEN'S ALLIANCE FOUNDATION, AND ROCKY MOUNTAIN ELK FOUNDATION,

Defendant-Intervenors.

DEFENDANT-INTERVENOR STATE OF WYOMING'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In its memorandum in support of its motion for summary judgment, Wyoming explained why its regulatory mechanisms more than support the Service's grizzly bear delisting decision. (ECF_211). While the Service is not required to rely upon legally-binding regulatory mechanisms, the Service did, in fact, rely upon Wyoming's enforceable regulations designed to protect the Greater Yellowstone population. (*Id.*). The Humane Society's original arguments to the contrary were unavailing. (*Id.*). Below, Wyoming addresses the Humane Society's retooled regulatory mechanism arguments, which are also unavailing.

I. The Service correctly determined that a "recalibration" provision was unnecessary and unwise.

Wyoming already has shown that the Endangered Species Act (ESA) did not require the Service to include a "recalibration" provision in the Conservation Strategy prior to delisting the Greater Yellowstone population. (ECF_211:23-24); (*see also* ECF_203:90-94). The Humane Society disagrees and responds that the ESA requires a recalibration provision because, if a new population estimator is adopted, the States will authorize discretionary mortality "at a much greater rate essentially overnight." (*See* ECF_227:2-3). This is patently false.

In Wyoming, for example, a change to the population estimator would require the Wyoming Game and Fish Commission to promulgate new regulations. (ECF_211:23-24). If it does not do so, Wyoming's Game and Fish Department

would not be able to comply with the State's grizzly bear regulations. (*Id.*). This regulatory change would need to go through notice and comment under Wyoming's Administrative Procedure Act. Wyo Stat. Ann. § 16-3-103. That does not happen overnight. *Id*. And if a group like the Humane Society believes that a regulatory change is arbitrary, it can challenge that decision in court. Wyo. Stat. Ann. § 16-3-114. Moreover, as Wyoming already discussed (and the Humane Society did not address in its response), any such regulatory change would require the Service to conduct an evaluation of the new regulation to see if it threatens the Greater Yellowstone population. (ECF_211:23-24). Accordingly, the Humane Society's alarmist claim that the States will increase mortality "essentially overnight" is simply hyperbole.

The Humane Society also argues that the Service violated the Administrative Procedure Act by not providing a "reasoned explanation" for not including a recalibration provision. (ECF_227:5). But the Service is not required to explain every road not taken during the rulemaking process.

The Humane Society argues that the Administrative Procedure Act requires agencies to provide a "reasoned explanation" when an agency considers an option in the midst of the rulemaking process and, ultimately, does not include that option in its final decision. In support of its argument, the Humane Society relies upon *Organized Village of Kake v. USDA*, 795 F.3d 956, 968 (9th Cir. 2015).

(ECF_227:5). But *Kake* dealt with something entirely different. The *Kake* court held that when an agency departs from a prior **final** decision in a new final decision, the agency must explain why it changed course. *Kake,* 795 F.3d at 968. That is a well-known and basic concept in federal administrative law. *See, e.g., FCC v. Fox TV Stations*, 556 U.S. 502, 514 (2009) (stating that an agency must explain its departure from "the [displaced] rule or policy") (brackets in original). Here, we have an agency that considered and then rejected an option **before** making a final decision. (ECF_227:4-5). That is entirely different from the situation in *Kake*. The Service did not depart from a prior final decision or policy. It merely chose not to include something it considered and rejected during its deliberative rulemaking process. The holding in *Kake* is not remotely applicable. The Humane Society's argument fails as a result.

II. Adjustments to allowable mortality based on sex-specific monitoring will not take "five to ten years."

Wyoming already has rebutted the Humane Society's contention that the Greater Yellowstone population will suffer a "catastrophic population decline" due to the fact that the Chao2 model relies, conservatively, on female grizzlies rather than male grizzlies to estimate population size. (ECF_211:20-23); (*see also* ECF_203:80-86). Specifically, the Humane Society's "male mortality" argument lacks merit because the Interagency Grizzly Bear Study Team "uses multiple techniques for monitoring, including [but not limited to] Chao2." (ECF_211:21). In

response, the Humane Society pivots away from its original argument that Chao2 is the only way that the Study Team monitors the Greater Yellowstone population. (ECF_227:10-13). It now argues that the Study Team will not act on any non-Chao2 monitoring data for at least five to ten years, and that violates the ESA. (ECF_227:11). The Humane Society is incorrect.

The scenario that the Humane Society fears is one in which there is a decline in the male population of grizzly bears and the decline goes undetected. (ECF_227:10-13). But such a decline **would** be detected by the monitoring of male grizzly mortality that the Service discussed in the delisting rule. (ECF_211:21). Accordingly, the Humane Society's argument must be read to say that the Study Team, of which Wyoming's Game and Fish Department is a member, will receive annual data on male mortality and that it will ignore that data, even if the data shows a precipitous drop in the male population. That is absurd. It runs directly counter to the State's incentive to keep the Greater Yellowstone population robust and off the list of threatened and engendered species.

It also shows the Humane Society's willingness to advance arguments that directly contradict one another. The Humane Society claims that Wyoming and the other States were eager to see the Service delist the Greater Yellowstone population and return the population to state management. (*See generally* ECF_194). That is correct. The Humane Society then turns around and argues that the States will ignore

data showing that the population is at risk, which will eventually lead to a relisting of the Greater Yellowstone population. (*See* ECF_227:10-13). That makes no sense. *See Defenders of Wildlife v. Zinke*, 849 F.3d 1077, 1084 (D.C. Cir. 2017) ("[Wyoming's] wildlife managers 'have consistently reiterated [] their desire not to come close to their floor levels due to concerns about reduced management flexibility and potential relisting.").

The Service may rely upon the States' shared commitment to manage a robust Greater Yellowstone population. *Defenders of Wildlife*, 849 F.3d at 1084 ("[T]he Service could reasonably conclude that Wyoming's efforts set forth in its management plan were sufficiently certain to be implemented based on the strength of the State's incentives."). This makes sense because the States have every incentive to fulfill their commitment and keep the population delisted. *Id*. The Humane Society's new "male mortality" argument runs counter to these basic concepts and common sense. Accordingly, this Court should reject it.

III. Wyoming's grizzly bear regulations make the Memorandum of Agreement enforceable.

Wyoming already has shown that the ESA does not require the Service to rely solely upon legally-enforceable regulatory mechanisms when delisting a species. (ECF_211:10-11); (*see also* ECF_203:63-68). In any event, Wyoming has shown that its grizzly bear regulations do, in fact, make the critical aspects of the Memorandum of Agreement (and, thus, the Conservation Strategy) enforceable.

(ECF_211:15-18). The Humane Society disagrees and argues that Wyoming's grizzly bear regulations only provide "that the States will meet once a year to set mortality limits, but do[] not incorporate any other provisions of the [Memorandum of Agreement]." (ECF_227:18) (citing *Rules Wyo. Game & Fish Comm'n,* ch. 67, § (4)(k)-(l)). This is incorrect.

Wyoming's grizzly bear regulations require the State's Game and Fish Department to "coordinate management of grizzly bears within the [Demographic Monitoring Area] through [the Memorandum of Agreement] to manage grizzly bear mortalities within the age and sex specific mortality limits identified in [Wyoming's Grizzly Bear] Management Plan for long-term viability of [the Greater Yellowstone population]." *Rules Wyo. Game & Fish Comm'n*, ch. 67, § (4)(k). The age and sex-specific mortality limits in Wyoming's Grizzly Bear Management Plan mirror the requirements in the Memorandum of Agreement. (*See* FWS_LIT_033537). That fact alone refutes the Humane Society's argument. A review of the plain language of Wyoming's grizzly bear regulations and the Memorandum of Agreement shows that the State's regulations also follow the Memorandum of Agreement in a number of other critical aspects: no discretionary mortality if the population is under 600; if total allowable annual mortality is exceeded, hunting mortality will be subtracted in the following year; and so on. The Humane Society's attempt to dismissively brush off Wyoming's grizzly bear regulations simply does not hold water.

IV. The arguments against Wyoming's hunting season lack merit.

The Humane Society advances two arguments that relate to Wyoming's 2018 grizzly bear hunting season. First, that Wyoming's 2018 hunting season exceeds the State's discretionary mortality limit under the Memorandum of Agreement, and second, that the Service did not consider Wyoming's hunting season prior to issuing the delisting rule. But Wyoming authorized its 2018 hunting season well after the Service delisted the Greater Yellowstone population. Accordingly, these "post-decisional" arguments are irrelevant to this Court's review of the Service's delisting rule. *See, e.g., Sw. Ctr. for Biological Diversity v. USFS*, 100 F.3d 1443, 1450 (9th Cir. 1996). In any event, the Humane Society's arguments lack merit.

A. Wyoming's hunting season is conservative and substantially under the quota limit.

As part of its post-decisional attack on Wyoming's 2018 hunting season, the Humane Society argues that Wyoming's 2018 season "exceeds its discretionary mortality allocation under the [Memorandum of Agreement]." (ECF_227:10_n.1). This is untrue.

Under the Memorandum of Agreement, the States of Idaho, Montana, and Wyoming "meet annually in the month of January to review population monitoring data supplied by [the Study Team] and collectively establish discretionary mortality limits for regulated harvest in each jurisdiction [in the Demographic Monitoring Area]." (FWS_Rel_Docs_001297). While the Memorandum of Agreement contains

a default percentage of discretionary mortality for each State, the States "may agree to adjust the allocation of discretionary mortality based on management objectives and spatial and temporal circumstances." (*Id*). The first of these post-delisting, annual meetings occurred in January 2018. While Montana chose not to authorize a 2018 hunting season, Idaho and Wyoming did. (*See* ECF_187:61). At the January meeting, the state wildlife agencies negotiated the allocation of discretionary mortality for 2018, which did not exceed the **total** allowable limit on discretionary mortality. The Humane Society does not dispute this. In an abundance of caution, Wyoming's Game and Fish Commission then subsequently rounded **down** the number of allowable female mortalities in the Demographic Monitoring Area for the 2018 hunting season. *Rules Wyo. Game & Fish Comm'n*, ch. 68, § 6 (allowing one female and ten male grizzly bear mortalities).

The Humane Society argues that, under the Memorandum of Agreement, Wyoming could not allocate **any** female mortality and only nine male mortalities in the Demographic Monitoring Area in 2018. (*See* ECF_227:10_n.1) (citing ECF_225:84-86)); (ECF_227:16). The Humane Society bases its argument on its calculation that Wyoming was only entitled to 0.87 female mortalities and 9.86 male mortalities in 2018.[1] (ECF_227:10_n.1) (citing ECF_225:84-86). This assumes that

[1] Wyoming disputes the relevance and accuracy of the Humane Society's calculation, which relies upon a report issued after the January 2018 meeting between the state wildlife agencies and after the promulgation of Wyoming's 2018

the States cannot round their default allocations up or down, even if the total discretionary mortality between the three States complies with the overall limits imposed by the Memorandum of Agreement, the Conservation Strategy, and the States' respective grizzly bear regulations. This makes no practical sense, but it conveniently allows the Humane Society to chip away at the total discretionary mortality limit. It also ignores the terms of the Memorandum of Agreement, which allows the States to adjust their respective allocations "based on management objectives and spatial and temporal circumstances." (FWS_Rel_Docs_001297). Montana's decision not to authorize a 2018 hunt and the States' subsequent agreement on the allocation of total discretionary mortality, which does not exceed the overall limit, is just such a "management objective" based on "temporal circumstances." The Humane Society's argument fails as a result.

B. The Service contemplated Wyoming's hunting season well in advance of delisting.

As the second prong of its post-decisional argument, the Humane Society asserts that the Service violated the ESA by not contemplating that Wyoming (or other States) might authorize a 2018 hunting season. (ECF_227:18-19). This argument cannot be taken seriously.

---

hunting regulations, but this Court need not resolve this dispute for the reasons discussed above.

The Service has known for **decades** that the States would almost certainly authorize a limited hunting season to assist in the management of a delisted grizzly bear population. For example, the rule that designated the lower-48 grizzly bear as "threatened" in the first place envisioned the use of hunting as a management tool for the post-delisted species: "If, in the future, grizzly bear populations in the Yellowstone ecosystem recover to the point where population pressures require removal of a part of the population, consideration will be given to a controlled reduction by sport hunting conducted by the concerned State wildlife agencies[.]" 40 Fed. Reg. 31734, 31735 (July 28, 1975). The original Grizzly Bear Recovery Plan acknowledged that "[s]port hunting on national forest, BLM, state and private lands is recognized as a legitimate tool for managing grizzly bear populations once recovery has been achieved[.]" (FWS_LIT_014372). And the Conservation Strategy, which underpins the delisting rule and is a critical part of the administrative record in this case, states: "the vision of the Conservation Strategy can be summarized as follows: [] allowing regulated hunting when and where appropriate"). (FWS_Rel_Docs_000305). Finally, the Service clearly contemplated that one or more of the States would authorize a hunting season in 2018 because the agency required each State to promulgate regulations governing hunting mortality prior to issuing the delisting rule. (*See* ECF_211:5-6, 12-15).

In short, just like in 2007, the Service was well aware that one or more of the States would authorize hunting post-delisting. And the Ninth Circuit found the Service's recognition of this reality to be "entirely appropriate." *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1031-32 n.7 (9th Cir. 2011). The same is true here. The Humane Society's argument lacks merit as a result.

CONCLUSION

At bottom, the dispute in this case rests on a fundamental disagreement between the parties about what the Endangered Species Act is and what it is not. The Humane Society and others believe that the Act requires what amounts to permanent listed status for the Greater Yellowstone population. The Service and the States believe that the Act provides for a finish line – recovery. The Act only supports the latter.

With regard to regulatory mechanisms, this Court must determine whether the existing federal and state mechanisms are so inadequate that it is likely that they will cause the recovered Greater Yellowstone population to be in danger of extinction within the foreseeable future. 16 U.S.C. § 1532(20) (defining a "threatened" species). The Service's delisting rule, the administrative record, and the Ninth Circuit's decision in 2011 show that is not remotely the situation here. "[T]he ESA 'does not mandate that regulatory mechanisms exist to protect a species from any conceivable impact." *Defenders of Wildlife*, 849 F.3d at 1087. It requires that they

be "adequate." 50 C.F.R. § 424.11(c)(4). The existing federal and state regulatory mechanisms easily meet that requirement.

Dated this 22nd day of August, 2018.

FOR DEFENDANT-INTERVENOR
STATE OF WYOMING

/s/ Adrian A. Miller

Adrian A. Miller
Sullivan Miller Law PLLC
3860 Avenue B
Suite C East
Billings, Montana 59102
(406) 403-7066 (phone)
(406) 294-5702 (fax)
adrian.miller@sullivanmiller.com

Erik E. Petersen, WSB No. 7-5608
D. David DeWald, WSB No. 7-5538
Senior Assistant Attorneys General
Wyoming Attorney General's Office
2320 Capitol Avenue
Cheyenne, WY 82002
(307) 777-6946 (phone)
(307) 777-3542 (fax)
erik.petersen@wyo.gov
david.dewald@wyo.gov

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2018, the foregoing was served by the Clerk of the U.S. District Court of Montana, Missoula Division, through the Court's CM/ECF system, which sent a notice of electronic filing to all counsel of record.

/s/ Adrian A. Miller
Adrian A. Miller

CERTIFICATE OF COMPLIANCE

1. In accordance with Local Rule 7.1(d)(2)(E) of the United States District Court for the District of Montana Local Civil Rules, the State of Wyoming files this Certificate of Complaince.

2. This document complies with Local Rule 7.1(d)(2)(A) and (E), since, exluding caption, the certificates of service and complaince, table of contents and authorities, and exhibit index, the document contains 2,506 words in 14-point Times New Roman font.

Dated this 22nd day of August, 2018.

/s/ Adrian A. Miller
Adrian A. Miller