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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 SAFARI CLUB INTERNATIONAL and NATIONAL RIFLE ASSOCIATION OF AMERICA, et al. Defendant-Intervenors.	CV 17-89-M-DLC-JCL (Consolidated with Case Nos. CV 17-117-M-DLC, CV 17-118-M-DLC, CV 17-119-M-DLC, CV 17-123-M-DLC, and CV 18-016-M-DLC) **REPLY TO OPPOSITION TO CROSS MOTION FOR SUMMARY JUDGMENT IN ALL CONSOLIDATED CASES BY DEFENDANT-INTERVENORS SAFARI CLUB INTERNATIONAL AND THE NATIONAL RIFLE ASSOCIATION OF AMERICA**

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CITATION FORMATS

Consistent with the Federal Defendants, Defendant-Intervenors Safari Club International and the National Rifle Association of America adopt the following approach from the Federal Defendants' cross-motion for summary judgment.

1. Citations to pleadings in this case are formatted as ECF_XX:YY, where XX refers to the ECF-document number and YY refers to the ECF-generated page number in the upper right corner.
2. Citations to the administrative and judicial record are formatted consistent with the U.S. Fish and Wildlife Service's ("FWS") Index, for example, FWS_Rel_Docs:XX, where XX refers to the bates stamp numbers generated by the FWS in the lower right corner of the document.

ACRONYMS AND SHORT NAMES

Under the Court's Order on the Briefing Schedule, ECF 178, the parties were to minimize the use of acronyms. Below are the acronyms and short names that SCI/NRA use in this brief, including those adopted by the Federal Defendants. Acronyms below marked with an * are mentioned in Court's Order on the Briefing Schedule, ECF 178.

Acronym or Short Name	**Long Name**
1975 Final Rule	Amendment Listing the Grizzly Bear of the 48 Conterminous States as a Threatened Species, 40 Fed. Reg. 31734 (July 28, 1975)
2017 Final Rule	Endangered and Threatened Wildlife and Plants; Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife, Final Rule, 82 Fed. Reg. 30502 (June 30, 2017)
ESA*	Endangered Species Act
Federal Defendants	Named defendants in six consolidated cases
FWS*	U.S. Fish and Wildlife Service
GYE (used in secondary sources)	Greater Yellowstone Ecosystem
Humane Society	*Humane Society of the U.S. v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017)
SCI/NRA	Defendant-Intervenors Safari Club International and the National Rifle Association of America
segment or DPS (used in secondary sources)	distinct population segment
Yellowstone Segment or GYE DPS (used in secondary sources)	The population of grizzly bears in the Yellowstone Ecosystem that became a "distinct population segment" under the ESA

I. INTRODUCTION

Plaintiffs wrongly maintain that well-regulated hunting of the grizzly bears under state management will undermine the continued recovery of the Yellowstone Segment. Plaintiffs also erroneously continue to try to apply certain holdings in *Humane Society of the U.S. v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017) to this case. SCI/NRA showed that the FWS fully analyzed (1) the impact of the Yellowstone Segment delisting on the so-called "remnant" grizzly bears, and (2) the impact of the loss of historical range on the Yellowstone Segment delisting determination. Plaintiffs remain incorrect in arguing that the FWS acted outside its authority under the ESA or contrary to the 1975 Final Rule when it designated a segment of grizzly bears for delisting. Finally, SCI/NRA are compelled to point out several instances where Plaintiffs made gross misrepresentations of the science that supports the Yellowstone Segment delisting.[1]

II. ARGUMENT

A. The Yellowstone Segment grizzly bears face no threats from recreational hunting.

In their memorandum in support of their cross motion for summary judgment, SCI/NRA thoroughly explained that any future hunting seasons

[1] SCI/NRA refer the Court to the opposition/reply brief filed by the Federal Defendants and opposition/reply briefs filed by other Defendant-Intervenors for comprehensive responses to Plaintiffs' arguments not addressed in this brief.

conducted in accordance with the 2017 Final Rule and Memorandum of Agreement would not place the Yellowstone Segment bears in jeopardy. ECF_214:9-17. Plaintiffs did not directly respond to any of SCI/NRA's points in their answering memorandums. But Plaintiffs made several other hunting-related arguments to which SCI/NRA respond here.

Plaintiffs' Assertion: "The Service fails to even mention how the projected increase in grizzly mortality from trophy hunting in conjunction with 'background' levels of mortality, loss of important food sources, and climate change may collectively threaten the Yellowstone grizzly segment." ECF_224:34 (citing 82 Fed. Reg. 30,502, 30,544 (June 30, 2017)). This is part of Plaintiffs' larger argument that the FWS failed to assess the threats that grizzlies face in a cumulative manner. *Id*. at 33-35.

SCI/NRA Response: First, FWS did assess the threats that the grizzly bears face in a cumulative manner. "We consider estimates of population trend (i.e., 'lambda') to be the ultimate metric to assess cumulative impacts to the population. It reflects all of the various stressors on the population." 82 Fed. Reg. at 30,544-45. Population trends were thoroughly discussed under a section titled "Population Ecology—Background," 82 Fed. Reg. at 30,505-08, and elsewhere throughout the 2017 Final Rule.

Second, the FWS thoroughly reviewed population data to determine sustainable total-mortality rates, which include mortality rates from hunting and all other sources. ECF_214:11. Thus, the FWS did assess the threats to the grizzly bears, including hunting, in a cumulative manner.

Plaintiffs' Assertion: '"[I]n poor seed years, female bears shifted to ungulate meat, increasing the probability of conflict with hunters' and 'nearly 2.6 times as many hunter-related deaths occurred during poor versus good seed years."' ECF_229:7 (quoting FWS_LIT_011534).

SCI/NRA Response: First, the figure in the literature cited by Plaintiffs in the above quote refers to all grizzly deaths, not just females. FWS_LIT_011534. Second, a grizzly harvest would likely reduce the number of conflict bears referenced in that study. That study found that in poor seed years, the bears shifted to a meat-based ungulate diet, which caused them to "move[] into areas open to hunting during the hunting season." *Id*. "[A]nd the association of ungulate meat with hunters likely compel bears to be less wary (or possibly more aggressive) toward hunters in the search for food, which leads us to conclude that differences in rates of hunter-related mortality in good versus poor seed years is more likely explained by changes in bear behavior." *Id*. The 2017 Final Rule notes "that hunting can be an appropriate management tool to address conflict bears and minimize future conflict with humans by replacing management removals, if

removals are properly targeted." 82 Fed. Reg. at 30,588; *see also* 40 Fed. Reg. 31,734, 31,735 (July 28, 1975) (1975 Final Rule noting that hunting can reduce grizzly bear "depredations and threats to human safety"). The 2017 Final Rule continues, "although hunting may increase the number of mortalities in the GYE, we believe many of these mortalities would replace management removals." 82 Fed. Reg. at 30,588. That is likely to be the case here: The aggressive bears that move into areas open to hunting and are subsequently hunted, will likely be bears that otherwise would have been removed by state authorities due to their status as problem bears.

Plaintiffs' Assertion: The states will not account for excess total mortality in any given year. Instead "only '***hunting*** mortality that exceeds total mortality limits' will be subtracted from the following year's limit." ECF_229:14 (citing FWS_Lit_005472, 016942) (emphasis in original).

SCI/NRA Response: The Memorandum of Agreement and the 2017 Final Rule directly address Plaintiffs' argument. In the Memorandum of Agreement, the states agreed: "At any population level greater than 600, if total allowable independent male or female mortality is exceeded, the number exceeding the total allowable mortality will be subtracted from the next year's discretionary mortality available for harvest for that gender." FWS_Rel_Docs_004920; *see also Defenders of Wildlife v. Zinke,* 849 F.3d 1077, 1084 (D.C. Cir. 2017) (holding that

the FWS can rely on non-binding state management plans when making delisting decisions). And in the 2017 Final Rule, the FWS wrote: "We do not consider the hunting regulations in Montana, Wyoming, and Idaho to be too liberal, but rather the States have agreed to strict mortality limits, with the additional safeguard of subtracting any excess mortality in subsequent years, which will ensure the GYE grizzly bear population remains at healthy levels." 82 Fed. Reg. at 30,598. Moreover, the states cannot authorize any mortality limits that exceed the sex- and population-based mortality limits in the 2017 Final Rule. 82 Fed. Reg. at 30,515 (Table 2).

B. The FWS fully considered the "remnant" population and the loss of historical range.

SCI/NRA explained in detail that the FWS considered (1) the impact of the delisting of the Yellowstone Segment on bears outside of that segment (the so-called "remnant"), ECF_214:17-26; and (2) the impact of the loss of historical range on the Yellowstone Segment. ECF_214:26-29. Plaintiffs inaccurately continue to insist that the Yellowstone Segment delisting is no different than the Western Great Lakes wolves delisting at issue in *Humane Society*. Plaintiffs have no answer to SCI/NRA's arguments.

Plaintiffs' Assertion: "In so doing, FWS chose to excise the Yellowstone population from the lower-48 listing but 'left ***entirely unexplained*** how the

remaining [bears'] existing [listed] status would continue.' *Humane Soc'y*, 865 F.3d at 602." ECF_229:21 (emphasis added).

SCI/NRA Response: Plaintiffs' assertion ignores SCI/NRA's extensive discussion of all the ways that the FWS considered the impact of the Yellowstone Segment's delisting on the remaining grizzly bears. ECF_214:20-26; *see also* ECF_203:48-51 (Federal Defendants' brief addressing the same issue). Both the 2017 Final Rule and other decision-making documents in the AR confirm FWS's consideration of these issues. ECF_214:20-24 (including chart of quotes from the 2017 Final Rule, and other citations). The FWS repeatedly found that the so-called "remnant" bears would remain listed and protected. This analysis fully explains the impact of the delisting and satisfies any requirement from *Humane Society.*

Plaintiffs' Assertion: "Under the ESA, the impact of delisting a segment on the remnant listed entity is an important factor because leaving a remnant that is not listable threatens to create 'a backdoor route to the de facto delisting of already-listed species, in open defiance of the [ESA's] specifically enumerated requirements for delisting.' *Humane Soc'y*, 865 F.3d at 602 (citation omitted)." ECF_229:23.

SCI/NRA Response: Whether or not this was a concern of the D.C. Circuit, it is not a concern here. Plaintiffs fail to explain why the so-called "remnant" is "not listable." As noted repeatedly, the remaining population remains listed and is

similar to the population before the Yellowstone Segment delisting (several populations anchor the nationwide listing). ECF_214:25-26. As SCI/NRA emphasized, unlike the gray wolves that remained listed following the Western Great Lakes segment delisting, on-the-ground listed grizzly bear populations exist following the Yellowstone Segment delisting. ECF_214:24-26.

Plaintiffs' Assertion: The 2017 Final Rule only "contains passing reference to historic range," and does not "examine the impact of loss of grizzly bear historical range" on the Yellowstone Segment. ECF_230:8-9.

SCI/NRA Response: The FWS thoroughly reviewed the impact of lost historical range as part of the delisting. ECF_214:26-28. The FWS, the states, and others have been studying the Yellowstone Segment and other grizzly bear populations for four decades with an eye toward conservation, recovery, and returning management to the states. *See, e.g.*, 82 Fed. Reg. at 30,508. Especially in the last 10-15 years of moving toward delisting the Yellowstone Segment, the FWS has been fully cognizant of the impact of historical range on the listing and delisting of the grizzly bear.

Plaintiffs' Assertion: "The Service failed to examine the impact of drawing a line around a segment, thereby eliminating the connections it has to grizzlies in their conterminous range." ECF_230:9.

SCI/NRA Response: The so-called "line" that Plaintiffs invoke is not a fence or a wall. Instead, it denotes that a different regulatory scheme applies within the area than outside it. Grizzly bears within the Yellowstone Segment will be managed and conserved primarily by the states and tribes (with ESA oversight for five years[2]), while bears outside will be managed and conserved by the federal government, states, and tribes. And whether listed or not, the Yellowstone Segment bears will exist in significant numbers and have essentially the same interactions with bears outside of the Yellowstone Segment. The FWS fully understood the impact of delisting as not a radical shift, but as leading to a different way of conserving this recovered population of the species.

C. The FWS's actions do not conflict with the 1975 Final Rule or grizzly bear recovery plans.

Neither the 1975 Final Rule nor grizzly bear recovery plans conflict with the Yellowstone Segment delisting. Plaintiffs largely reiterate their attempt to read into the rule an all-or-nothing delisting requirement that does not exist.

Plaintiffs' Assertion: The 1975 Final Rule "does not provide for the delisting of individual populations. Instead, the rule lists all grizzlies in the lower-48 as a *single entity* . . . ." ECF_224:8 (citing 40 Fed. Reg. at 31,734-36) (emphasis supplied by Plaintiffs).

[2] 82 Fed. Reg. at 30628.

SCI/NRA: As SCI/NRA explained in their memorandum in support of their cross motion for summary judgment, nothing in the 1975 Final Rule or the subsequent grizzly bear recovery plans limits the FWS to Plaintiffs' desired all-or-nothing delisting approach. ECF_214:31-34. Plaintiffs offer nothing new in their replies that dispute SCI/NRA's arguments.

Plaintiffs' Assertion: "[T]he lower-48 listing envisioned managing grizzlies as a 'functional meta-population' that will 'enhance the genetic and demographic health of all . . . population units . . . .'" ECF_224:9 (quoting FWS_Del_Em:151569). Plaintiffs argue that the delisting of the Yellowstone Segment is contrary to the idea of a "functional meta-population" as described in a draft Director's Memo. *Id.*

SCI/NRA Response: The draft Director's Memo discusses a "functional meta-population" of bears in the "Northern Rockies and the Cascades among and between these populations and across the border with their adjacent Canadian population units." FWS_Del_EM:151569. It in no way implies that the FWS must use an all-or-nothing delisting approach or that the FWS cannot delist the Yellowstone Segment. In fact, the memo indicates the exact opposite of what Plaintiffs suggest. It concludes, "it is the policy of the [FWS] to recover and delist ***each population unit*** . . . [upon] achievement of the [recovery goals]." *Id*. at 151570. Plaintiffs' use of selective quotations from the memo is not persuasive.

D. The FWS has the authority to delist the Yellowstone Segment.

SCI/NRA explained that (1) the lower-48 listing did not constitute a segment because the FWS did not have that option in 1975, and (2) the 1975 Final Rule did not intend to treat the lower-48 bears as a single segment. ECF_214:29-31. Nevertheless, Plaintiffs maintain that the lower-48 listing was a segment. Plaintiffs are wrong.

Plaintiffs' Assertion: After Congress authorized the FWS to list and delist segments, the FWS reviewed a number of ESA listings, including the lower-48 grizzly listing, to determine if they constituted segments. After this review, the lower-48 grizzlies "retained their listing status but were recognized as 'segments' in accordance with the segment policy." ECF_224:11 (citation omitted).

SCI/NRA Response: Regardless of whether the FWS internally considered the lower-48 listing to be a DPS in a guidance document, the 1975 Final Rule was never formally amended, via rulemaking, to recognize the lower-48 bears as a single DPS. The APA "defines 'rule making' to include not only the initial issuance of new rules, but also 'repeal[s]' or 'amend[ments]' of existing rules." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015) (citing 5 U.S.C. § 551(5)). Because the FWS could not amend the 1975 Final Rule without rulemaking, the lower-48 bears have never been considered a DPS. Any indication that the bears did constitute a DPS, *see* ECF_224:12-13, was likely for purposes of

administrative convenience for the FWS and does not prohibit the FWS from delisting the Yellowstone Segment.

Plaintiffs' Assertion: The FWS has the "option to replace the lower-48 listing with multiple segment listings." ECF_224:14; *see also* ECF_118:27-28 (Plaintiffs discussing the FWS's authority to designate a DPS and then delist it).

SCI/NRA Response: Plaintiffs do not dispute that the FWS has the authority to delist the Yellowstone Segment; they simply disagree with the process that the FWS undertook to do so. Plaintiffs would prefer that the FWS undergo one or two more procedural steps before being able to delist the Segment. If the Court agrees that the lower-48 listing became a "de facto" DPS without rulemaking, as Plaintiffs argue, then the Court should also conclude that the FWS fulfilled all procedural requirements regarding designation of the Yellowstone population as a Segment. Plaintiffs seem to want their cake and to eat it too. They cannot reconcile their argument that the lower-48 listing was turned into a DPS without the required procedure with their argument that because the FWS did not follow the allegedly required procedure, the FWS cannot delist the Yellowstone Segment. Regardless of the Court's conclusion on this issue, the FWS has the authority to delist the Yellowstone Segment.

E. Plaintiffs have made gross misrepresentations of the science and the FWS's findings in support of their claims.

Courts "are to be 'most deferential' when the agency is 'making predictions within its [area of] special expertise, at the frontiers of science.'" *Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 921 (9th Cir. 2018) (citation omitted) (alteration in original). This includes the best-available-scientific-and-commercial-data standard under the ESA, which '"merely prohibits [the agency] from disregarding available scientific evidence that is in some way better than the evidence it relies on."' *Id*. at 924 (citations omitted).

It's doubtful that the FWS disregarded any data because the Department of the Interior, through the U.S. Geological Survey, leads the Interagency Grizzly Bear Study Team, which "has made the GYE grizzly bear population the most studied in the world." 82 Fed. Reg. at 30,508. And since there is no better scientific data, Plaintiffs' only option is to show that the FWS's conclusions are arbitrary and capricious under the APA. *Defenders of Wildlife,* 849 F.3d at 1089 ("Such competing views about scientific data and policy choices, however, fail to show that the Service's conclusions were arbitrary and capricious or contrary to law."). But in attempting to do so, they have made several gross misrepresentations of the FWS's findings.

Plaintiffs' Assertion: "The switch [from whitebark pine] to meat poses unique threats to bear cubs, because cubs whose mothers rely on meat suffer

greater risk of predation…. Indeed, FWS found that cub and yearling survival decreased significantly in recent years, 'caus[ing] the slowing population growth since the early 2000s.'" ECF_190:11 (quoting FWS_Rel_Docs_001544).

SCI/NRA Response: Plaintiffs' selective quotation is taken entirely out of context. The quote in the 2017 Final Rule on which Plaintiffs rely continues:

> The IGBST investigated if the decline in cub and yearling survival could be a function of decline in food resources (whitebark pine) or whether associated with grizzly bear density. ***Survival of cubs-of-the-year was lower in areas with higher grizzly bear densities but showed no association with estimates of decline in whitebark pine tree cover, suggesting that grizzly bear density contributed to the slowing of population growth*** (van Manen *et al.*2016, p. 308). Other studies support the interpretation of density effects playing an increasingly important role in the ecology of GYE's grizzly bears (Schwartz *et al.* 2006b, p. 1; Bjornlie *et al.* 2014b, p. 5).

82 Fed. Reg. at 30,611 (emphasis added). Thus, three scientific studies attribute the slowing population growth to increased population density—not to a decline in whitebark pine or switch to a higher meat diet.

Plaintiffs' Assertion: "In fact, the Service recently admitted that 'the effective population size and heterozygosity levels of the [isolated Yellowstone grizzly segment] are only adequate *for the next several decades* [approximately 20 years]."' ECF_186:36 (quoting 83 Fed. Reg. 18,737, 18,741 (Apr. 30, 2018)) (emphasis and alterations supplied by Plaintiffs).

SCI/NRA Response: Plaintiffs materially altered that quote. The actual quote states: "Currently, the effective population size and heterozygosity levels in

the GYE are adequate to maintain genetic health of the GYE population for ***at least*** the next several decades (Miller and Waits 2003, p. 4338; Kamath et al. 2015, entire)." 83 Fed. Reg. at 18,741 (emphasis added). And "[t]he states have committed to a variety of [management] measures to maintain genetic diversity," including "translocation of bears … in the future if necessary." *Id*.; *see also Defenders of Wildlife,* 849 F.3d at 1092 ("[T]he ESA did not prohibit the [FWS] from delisting in Wyoming where translocation could eventually be necessary as a stopgap measure after many generations of insufficient natural connectivity."). Thus, the scientific data show that the Yellowstone Segment bears will not face genetic diversity issues for more than 30 years,[3] and there are adequate stopgaps in place if any genetic-diversity issues arise.

III. CONCLUSION

For the reasons explained above, in SCI/NRA's cross motion for summary judgment, the Federal Defendants' motion and briefs, and in the other Defendant-Intervenors' briefs, SCI/NRA request that the Court grant their cross-motion for summary judgment and deny Plaintiffs' motions for summary judgment.

[3] By definition, "several" means "more than two or three." *American Heritage Dictionary of the English Language* 1605 (5th ed. 2011).

DATED this 22nd day of August, 2018.

Respectfully submitted,
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