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

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)

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GLOSSARY

Demographic Monitoring Area ..... DMA

Endangered Species Act ..... ESA

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

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

INTRODUCTION

The ESA provides federal protections for threatened or endangered species, with the ultimate goal of recovering listed species to the point where they can be delisted and returned to state management. The best scientific information available confirms that the Yellowstone Segment is recovered, and has been so for more than a decade. A population that once may have had as few as 136 grizzly bears now has around 700 bears, about 200 more than is required for the Segment to be recovered. The Yellowstone Segment no longer needs ESA protections and therefore should be delisted.

Yet, for the second time in the past decade, a district court in this Circuit has vacated a final rule to delist the Yellowstone Segment. And the court's reasons for doing so have nothing to do with whether the Segment still warrants federal protection under the ESA.

The district court did not find that any current threat precludes the Yellowstone Segment from being delisted. Instead, the court vacated the current delisting rule based on:

- A perceived problem related to a possible change to the method used to count the number of bears in the Yellowstone Segment each year, even though that change will not occur, if at all, until sometime beyond the foreseeable future;

- A flawed interpretation of the ESA that would require the Service to perform an additional status review to determine whether delisting the Yellowstone Segment will change the listing status of the other grizzly bear populations in the continental United States, even though the Service explained that the other populations will remain listed as a threatened species; and
- The district court's personal preference that the long term genetic health of the Yellowstone Segment be managed proactively through translocation, even though genetic diversity does not pose a threat to the Yellowstone Segment within the foreseeable future.

None of these alleged problems require the current delisting rule to be vacated. A possible change in the method for counting bears is a non-issue because the current counting method will be used for the foreseeable future. The listed status of other grizzly bear populations in the continental United States has nothing to do with whether the Yellowstone Segment should be delisted. And genetic diversity should not be a problem in the Yellowstone Segment for at least the next few decades, if ever.

The district court had no legitimate legal or factual basis for vacating the current delisting. This Court, therefore, should reverse the district court's holdings on the three issues raised in this appeal and reinstate the delisting rule for the Yellowstone Segment.

JURISDICTIONAL STATEMENT

In the United States District Court for the District of Montana, the plaintiffs asserted claims based on the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and the ESA, 16 U.S.C. §§ 1531-1544. The district court had subject matter jurisdiction over the claims under 28 U.S.C. §1331, 5 U.S.C. § 704, and 16 U.S.C. § 1540 (c), (g)(1)(C) and (2)(C).

The district court entered final judgment in favor of the plaintiffs on October 23, 2018. (1ER1). This final judgment disposed of all claims pending before the court. (1ER48-49). This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

The State of Wyoming filed its notice of appeal on December 5, 2018. (2ER 80-82). Wyoming's appeal is timely under Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure because: (1) it was filed within sixty days after the entry of the final judgment appealed from; and (2) parties to the case include the United States, a United States agency, and United States officers and employees in their official capacities.

ISSUES PRESENTED

I. Did the United States Fish and Wildlife Service correctly determine that the Yellowstone Segment should be delisted even though the signatories did not include recalibration language in the Conservation Strategy?

II. Did the Service satisfy the requirements for delisting under the ESA even though it determined that the status of other grizzly bear populations in the continental United States was outside the scope of the delisting analysis for the Yellowstone Segment?

III. Did the Service correctly determine that it is not necessary to translocate grizzly bears into the Yellowstone Segment until evidence shows that genetic diversity in the Segment may be decreasing?

PERTINENT STATUTORY AND REGULATORY AUTHORITIES

All relevant regulatory authorities appear in the Addendum to this brief. All relevant statutory authorities appear in the Addendum to the Federal Appellants' opening brief.

STATEMENT OF THE CASE

I. FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

In its opening brief, the Service included an overview of grizzly bear recovery, the grizzly bear delisting rule adopted in 2007 and the litigation related to it, and the substance of the preamble for the grizzly bear delisting rule adopted in 2017 (2017 delisting rule). (Fed. Opening Br. at 3-11). The State of Wyoming will not repeat those facts here.

A. Facts Relevant To The Recalibration Issue

The recalibration issue arises from proposed language included in the draft Conservation Strategy, but ultimately not included in the final Conservation Strategy.[1] In the draft Strategy, the proposed recalibration language provided as follows:

> The population goal is set for the average population size 2002–2014 inside the DMA. The current and approved method to estimate population size in the DMA uses the model-averaged Chao2 estimator. **If another population estimator was adopted as per the Conservation Strategy procedures described above, this new population estimator will be applied to the 2002–2014 data to estimate the average population size 2002–2014.** The new population estimate results would be inserted in Table 1 to reset the population size numbers with the same sliding scale, with the intent to

[1] For purposes of this appeal, recalibration means the act of using a new population estimator to recalculate the past annual population numbers generated by the model-averaged Chao2 population estimator. (1ER32,36) (providing two definitions of recalibration).

> maintain the population goal of the average population size 2002–2014. …

(WY-SER7).

1. Population estimators and the demographic recovery criteria.

The disagreement between the Service and the States regarding recalibration derives from the relationship between the annual population estimate generated by the agreed upon population estimator and the total annual population management goal for the Demographic Monitoring Area[2] as established by Demographic Recovery Criterion 3 in the Conservation Strategy. Information in the administrative record about population estimators and demographic recovery criteria provides context for understanding the nature of the disagreement.

a. Population estimators

Currently, the Service and the States use the model-averaged Chao2 population estimator to determine the total grizzly bear population size in the Greater Yellowstone Ecosystem. (2ER94). The Service characterizes the Chao2 estimator as "conservative" because it undercounts the number of bears. (2ER136). The underestimation bias in the Chao2 method increases as the total bear population grows. (2ER144). This bias notwithstanding, the Service has concluded

[2] The Demographic Monitoring Area "is the geographic area where state wildlife agencies will actively monitor the grizzly bear population and manage for its long term viability" after delisting. (WY-SER64)

the Chao2 estimator "is the best science that is currently available and that can apply under the current monitoring schemes." (2ER143).

In the preamble to the 2017 rule, the Service acknowledged that other population estimators provide higher population estimates than the Chao2 method, and then explained why those estimators are not better science than the Chao2 estimator. (2ER144). In particular, the Service noted that the other estimators are "currently not available with the data we have, [and] the annual implementation of these methods would be prohibitive both in costs and logistics." *Id.* In the Conservation Strategy, the signatories agreed to use the model-averaged Chao2 method for the foreseeable future.[3] (2ER147).

b. Demographic recovery criteria

The Service delisted the Yellowstone Segment because it is recovered and no longer warrants protection under the ESA. (2ER206). To assure that the Segment continues to be recovered for the foreseeable future, the signatories to the Conservation Strategy established three categories of numeric demographic recovery criteria to govern the post-delisting management of the Yellowstone Segment. (2ER95). Demographic Recovery Criteria 1 and 3 are relevant to the recalibration issue.

[3] In this context, the term "foreseeable future" means the time period for which the Service can make reliable predictions about future events "without veering into speculation." (2ER188).

Demographic Recovery Criterion 1 requires the signatories to maintain a minimum total population size of 500 bears and at least 48 females with cubs-of-the-year in the Demographic Monitoring Area. *Id.* The minimum number of 500 grizzly bears is not subject to change if the signatories adopt a new population estimator to replace the Chao2 method, regardless of recalibration. (2ER93). (explaining that, in 1993, the Service eliminated Criterion 1's dependence on a specific counting method). The Service established a minimum population size of 500 bears in the Demographic Monitoring Area to ensure the short term genetic health of the Yellowstone Segment for at least the next few decades. (2ER95 & n.1).

Demographic Recovery Criterion 3 requires the signatories to maintain the total grizzly bear population in the Demographic Monitoring Area "around the 2002–2014 model-averaged Chao2 population estimate average size" of 674 bears. (2ER95). They will manage the total population size in the Demographic Monitoring Area within the confidence intervals for the 2002-2014 average population size (between 600 and 747 bears). (2ER137). Criterion 3 provides the post-delisting management goals for the Yellowstone Segment. (2ER96 (Table 2)).

The signatories will manage mortality "to ensure that the population does not drop and remain below 600" bears. (2ER136). If the total population drops

below 600 bears, discretionary mortality will stop (except as necessary for human safety) until the population size increases above 600 bears.[4] (2ER136).

The signatories also have agreed to apply specific sex and age-based annual total mortality limits that should prevent a significant number of discretionary mortalities in a given year. (2ER95; 96 (Table 2); 112-13 & Table 3). The States will suspend grizzly bear hunting within the Demographic Monitoring Area if the total annual mortality limit for any of the sex and age-based classes is met at any time during the year, regardless of whether the allocated regulated harvest limits have been met. (2ER113).

2. The relationship between the total annual population estimate, the post-delisting population management goals, and annual discretionary mortality.

During the delisting process, the Service and the States disagreed on whether recalibration should be used to adjust the total population management goal established by Demographic Recovery Criterion 3 if the signatories replace the Chao2 method with a new population estimator in the future. *See, e.g.*, (WY-SER108-12; 69-70). The National Park Service proposed that the concept of recalibration be included in the Conservation Strategy. (WY-SER147-49). Without

[4] In this context, discretionary mortality means "[m]ortalities that are the result of hunting or management removals." (2ER213).

the agreement of the States, the Service added the proposed recalibration language to the draft Strategy. (WY-SER124) (Comment idmtwy2)).

The disagreement centered on how recalibration (or lack of recalibration) might affect the number of grizzly bears potentially subject to discretionary mortality each year. (WY-SER69-70). Under the terms of the Conservation Strategy, the signatories have committed to manage the Yellowstone Segment to maintain a grizzly bear population within a range of numbers around 674 bears in the Demographic Monitoring Area (600 bears to 747 bears). (2ER137). In a given year, if the annual population estimate (as determined by the population estimator) exceeds the population management goal number (as established in Demographic Recovery Criterion 3), the difference between the two numbers represents the number of bears that potentially may be subject to discretionary mortality. (2ER113-14). For example:

- If the signatories use the model-averaged Chao2 method, and if the States agree that the population management goal for a given year will be 650 bears, and if the Chao2 method estimates that 700 bears are living within the Demographic Monitoring Area, then at least 50 bears potentially would be subject to discretionary mortality that year.

- If the signatories adopt a new population estimator and do not recalibrate the 2002-2014 average population number, and if the States agree

that the population management goal for a given year will be 650 bears, and if a newly adopted population estimator says that 1000 bears are living within the Demographic Monitoring Area, then at least 350 bears potentially would be subject to discretionary mortality that year.

The larger discretionary mortality margin in the non-recalibration example does not mean that 350 bears would be killed in any given year or over any given period of time. The specific sex and age-based annual total mortality limits should prevent a significant number of discretionary mortalities in a given year. (2ER95; 96 (Table 2);112-13 & Table 3). In addition, the States will collectively establish discretionary mortality limits for regulated harvest each year with the goal of assuring that the various mortality limits are not breached. (WY-SER67).

3. The debate over recalibration during the delisting process.

The proposed recalibration language was the subject of much debate between the Service and the States during the delisting process. *See*, *e.g.*, (WY-SER123-29; 94-118; 82-90). Dr. Chris Servheen (the Grizzly Bear Recovery Coordinator for the Service) was concerned that a significant number of bears would be subject to discretionary mortality if a new population estimator resulted in higher annual population estimates and the population management goal was not recalibrated to adjust it upward. *See* (WY-SER6) ("This would

allow reducing the population by hundreds of bears."); (WY-SER1) ("If we accept this approach, the States could reduce 1200 bears to 683."). An official for the Department of the Interior and the Superintendent of Yellowstone National Park had similar concerns. *See* (WY-SER72) ("the risk exists that the population could be significantly reduced"); (WY-SER70) ("Dan (Wenk) stated that he didn't want to see 200-300 bears available for harvest.").

The States were concerned that no existing estimator could use past data to recalculate the past Chao2 population estimates and that recalibration would be used to revise Demographic Recovery Criterion 3 (presumably by increasing the post-delisting management goal number) with no biological basis for doing so. *See e.g.*, (WY-SER69-70); *see also* (WY-SER149). They also believed that, given the various mortality limits established in Demographic Recovery Criterion 3, "there would be no conceivable way" for a significant number of bears to be subject to discretionary mortality in a given year. (WY-SER70).

The Yellowstone Ecosystem Subcommittee assigned the recalibration issue to its Population Management Subgroup and directed the Subgroup to determine whether the recalibration language should be included in the Conservation Strategy. (WY-SER146-48). After giving both sides an opportunity to state their case on the issue, the Subgroup recommended that the recalibration language be deleted from the Conservation Strategy. (WY-SER149-50; 69-70).

After the Subgroup made its recommendation, the disagreement over recalibration language continued. In an effort to find common ground on the recalibration issue, the directors of the game and fish departments of the three States proposed the following recalibration language to the Subcommittee:

> Adoption of a different population estimator will require recalibration of the associated demographic objectives and standards if the [Yellowstone Grizzly Bear Coordinating Committee] determines that such recalibration is necessary for maintaining a recovered grizzly bear population as defined in the Conservation Strategy.

(WY-SER74).

The next day, the Service forwarded the following proposed alternative language regarding recalibration to the Subcommittee:

> *Adoption of a different population estimator will require recalibration of the associated demographic objectives and standards ~~if the YGCC determines that such recalibration is necessary for maintaining a recovered grizzly bear population as defined in the Conservation Strategy.~~ (e.g. populations objective, confidence intervals, mortality limits) that are based upon the population estimator.*

(WY-SER79) (italics and strike through in original).

The Subcommittee voted on the proposals at a meeting held on November 4, 2016. (WY-SER108-12). It rejected the language proposed by the Service by a 14-5 vote. *Id*. The States asked the Subcommittee to adopt the Conservation Strategy without language addressing recalibration. (WY-SER112). The Subcommittee rejected their proposal by a 10-9 vote. *Id*.

The Subcommittee chair then asked the States if they wanted to offer a different motion (presumably the language proposed by the State game and fish directors). *Id*. The States decided not to do so. *Id*.

About a week after the November 4 meeting, the Service and the States agreed to use the model-averaged Chao2 estimator for the foreseeable future after delisting. (WY-SER138-41; 120; 119; 92; 93). In mid-November 2016, the Subcommittee discussed the Chao2 proposal. The representative from Idaho explained the proposal as follows:

> One of the key changes we made because of an issue with the longevity of our commitment, we made the change that says foreseeable future. New edits were based on best available science. **We had a conversation on recalibration and decided that Chao2 is based on best available science. We wanted to make a commitment to use that for the foreseeable future and not change midstream.** We dropped the notion of recalibration and inserted the notion of using Chao2 for the foreseeable future. It doesn't preclude best available science in the future.

(WY-SER142) (emphasis added).

The Subcommittee approved the Chao2 proposal (along with other proposed changes to the Conservation Strategy) by an 18-1 vote. (WY-SER143).

The Subcommittee approved the Conservation Strategy on December 16, 2016. (2ER96). In the Strategy, the signatories commit "to using the model-averaged Chao2 population estimator for the foreseeable future to maintain the population around the average population size from 2002 to 2014." (2ER147); *see also* (3ER262); (2ER94; 112 (Table 3)).

In the preamble to the 2017 delisting rule, the Service explained that the proposed recalibration language was removed from the Conservation Strategy because "retroactive estimation using the new method would not be possible." (2ER147). This explanation aligns with one of the concerns voiced by the States during the debate over recalibration. (WY-SER149).

B. Facts Relevant To The Delisting Analysis Issue

The delisting analysis issue arises from the fact that, in the preamble to the 2017 delisting rule, the Service did not analyze how delisting the Yellowstone Segment might impact the status of other grizzly bear populations living in the continental United States. In the preamble, the Service determined that the listed status of the other grizzly bear populations was "outside the scope" of the Yellowstone Segment delisting analysis. (2ER127; 205). It explained that, after delisting, other grizzly populations living in the continental United States will continue to be listed as threatened because the 2017 delisting rule affects only the legal status of the Yellowstone Segment. (2ER205); *see also* (2ER84; 127; 133; 204; 209).

The Service also explained the legal basis for its decision to limit the delisting analysis to the status of the Yellowstone Segment. It incorporated Department of the Interior Solicitor Opinion M-37018 by reference when it

noted that the delisting analysis in the preamble "is consistent with the opinion." (2ER98). The Service then explained:

> Section 4(a)(1) of the Act authorizes the Service at any time to determine whether **a species, which by definition includes a DPS**, is endangered or threatened. Section 3(16) of the Act defines a ''species'' as including any subspecies of vertebrate fish or wildlife which interbreeds when mature. In addition, section 4(c)(1) of the Act authorizes the Service to revise the List to reflect recent determinations made under section 4(a) by directing the Service to ''from time to time revise each list … to reflect recent determinations, designations, and revisions.'' **Nothing in the Act suggests that the Service is precluded from making such determinations and revisions with respect to a subspecies or DPS that is part of a larger listed species.**

(2ER202-03) (emphasis added).

One month after the Service published the 2017 delisting rule, the United States Court of Appeals for the District of Columbia Circuit issued an opinion in *Humane Society of the United States v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017). In *Humane Society*, the D.C. Circuit Court of Appeals held that the Service violated the ESA when it delisted a distinct population segment for the Western Great Lakes gray wolf population without considering the impact of the delisting on other gray wolf populations in the United States that remained under ESA protections. *Humane Soc'y of the U.S.*, 865 F.3d at 601-03.

Four months after the *Humane Society* opinion was issued, the Service published a notice seeking public comment on what impact, if any, the *Humane Society* might have on the 2017 delisting rule. 82 Fed. Reg. 57698-699 (Dec. 7,

2017). In late April 2018, the Service issued a written determination in which it concluded that the *Humane Society* decision did not require it to modify the 2017 delisting rule. 83 Fed. Reg. 18737-743 (April 30, 2018).

C. Facts Relevant To The Translocation Issue

The translocation issue arises from the Service's reliance on the two genetics studies in the 2017 delisting analysis and the district court's finding that no existing regulatory mechanisms address the long term management of genetic diversity for the Yellowstone Segment. In its opening brief, the Service argues that: (1) the administrative record supports the Service's conclusions that genetic diversity is not a threat to the Segment for the foreseeable future; (2) the district court improperly substituted its own interpretation of the two genetics studies for that of the Service; and (3) the district court improperly substituted its judgment for that of the Service regarding what should be done to manage the long term genetic health of the Segment. (Fed. Opening Br. at 28-37). Wyoming generally agrees with those arguments and will not repeat similar arguments later in this brief. As a result, Wyoming also will not repeat here the facts relevant to the genetic health and genetic studies aspect of the translocation issue.

The facts relevant to the translocation argument in this brief involve the post-delisting management commitments made by the signatories to the Conservation Strategy. After delisting, the signatories will monitor the genetic

health of the Yellowstone Segment. (2ER117). Montana will manage bears in the areas between the Northern Continental Divide Ecosystem and the Greater Yellowstone Ecosystem in a manner that should facilitate occasional movement of bears between the two ecosystems. (3ER275). Wyoming will evaluate the genetic health of the grizzly bear population by monitoring grizzly bear movements into and out of the state and by collecting and analyzing genetic samples from bears. (WY-SER65-66). It will consider the translocation of bears into the Wyoming portion of the Yellowstone Segment if genetic health becomes a concern. (WY-SER66).

In the preamble for the 2017 delisting rule, the Service explained that translocation of bears into the Yellowstone Segment "will be a last resort and will be implemented only if there are demonstrated effects of lowered heterozygosity among [Greater Yellowstone Ecosystem] grizzly bears or other genetic measures that indicate a decrease in genetic diversity …." (2ER117). T he Service stated that any possible reduction in the genetic diversity of the Segment "will be responded to accordingly with translocation of outside bears into the [Segment]." *Id*.

II. THE RELEVANT PROCEDURAL HISTORY

In March 2016, the Service issued a proposed rule to designate the grizzly bear population in the Greater Yellowstone Ecosystem as a distinct population segment and to delist that segment. (WY-SER8-62).

In late June 2017, the Service issued a final rule to create the Yellowstone Segment and to delist that Segment. (2ER83-214). On the same day that the 2017 delisting rule was published in the Federal Register, the Crow Indian Tribe plaintiffs filed a complaint seeking judicial review of the rule. (3ER460 (Doc. #1)). In total, six different lawsuits were filed in the Montana district court seeking judicial review of the 2017 delisting rule. (U.S.D.C. (Mont.) Nos. 17-cv-00089; 17-cv-00117; 17-cv-00118; 17-cv-00119; 17-cv-00123; 18-cv-00016).

In mid-November 2017, the district court consolidated five of the pending grizzly bear lawsuits under the 17-cv-00089 case number. (3ER464 (Doc. #34)). In early 2018, the sixth lawsuit was consolidated with the other suits under the 17-cv-00089 case number. *See* (3ER467 (Doc. #120)).

The district court bifurcated one claim in Case Number 17-cv-00089 and three claims in Case Number 18-cv-00016 so that the briefing on summary judgment would address only the ESA and Administrative Procedure Act claims raised in the respective cases. (3ER483 (Doc. #178)). After the parties filed cross motions for summary judgment, the district court granted the plaintiffs' motions. (1ER48-49). It vacated the delisting rule and remanded the matter to the Service. *Id.*

In early December 2018, the State of Wyoming timely appealed the district court decision to this Court. (2ER80-82).

III. THE RULINGS PRESENTED FOR REVIEW

The district court granted summary judgment in favor of the plaintiffs on three distinct grounds. First, the court found that the Service acted arbitrarily and capriciously when it did not consider the impact of delisting the Yellowstone Segment on the other grizzly bear populations living in the continental United States. (1ER4). Second, the court concluded that the Service violated the best available science mandate in the ESA when it did not require the States to ensure that any population estimator adopted in the future would be calibrated to the population estimator used to justify delisting. *Id*. And, finally, it determined that the Service acted arbitrarily and capriciously when it relied on two genetics studies to support its conclusion that the Yellowstone Segment population remains genetically self-sufficient. *Id*.

SUMMARY OF THE ARGUMENT

I. The best available science mandate does not apply to recalibration because the signatories to the Conservation Strategy will use the Chao2 method for the foreseeable future. If the signatories will not adopt a new population estimator within the foreseeable future, then the possible need to recalibrate the 2002-2014 average population estimate cannot arise until sometime after the foreseeable future. The Service properly excluded recalibration from the Yellowstone Segment delisting analysis because the ESA does not require the Service to consider matters

that will not occur within the foreseeable future in a delisting analysis. The district court's holding on the recalibration issue should be reversed because the law and the facts do not support the holding. Regardless, this Court should defer to the Service's decision to approve use of the Chao2 method for the foreseeable future because the Chao2 method will result in a conservative approach to estimating total population size and it is unknown when (or if) a different estimator will supplant the Chao2 method as the best available science.

II. 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. Based upon its construction of the statutorily defined word "species," the Service concluded that the Segment is a "species" independent of the broader grizzly bear species listing. The Service's construction of the statutorily defined word "species" is entitled to *Chevron* deference. If the Segment is a "species" by itself, then the Service properly limited the delisting analysis to the Segment only. No provision in the ESA reasonably can be construed as requiring the Service to perform a status review for a different "species" in the Yellowstone Segment delisting analysis. The district court's holding on the delisting analysis issue should be reversed because the ESA does not support the holding.

III. The Service properly analyzed the genetic health of the Yellowstone Segment and correctly determined that translocation should be used as a last resort and only if the best available science shows that genetic diversity within the Segment may be decreasing. The district court's holding on the translocation issue should be reversed because the court: (a) improperly substituted its judgment for that of the Service; and (b) incorrectly found that no existing regulatory mechanisms address how the signatories will address potential future threats to the genetic health of the Segment.

STANDARD OF REVIEW

The same standard of review applies to all three issues raised in Wyoming's appeal. This Court reviews *de novo* the district court's grant of summary judgment. *See Nw. Ecosystem All. v. U. S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007). This Court "view[s] the case from the same position as the district court." *Nev. Land Action Ass'n v. U. S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (citation omitted and internal quotation marks omitted).

The arbitrary and capricious standard in 5 U.S.C. § 706(2)(A) governs the review of the Administrative Procedure Act and ESA issues in this appeal. *See Ariz. Cattle Growers' Ass'n v. U. S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1235-36 (9th Cir. 2001). Agency action is arbitrary and capricious if: (1) the agency relied on factors which Congress did not intend for the agency to consider; (2) the agency

entirely failed to consider an important aspect of the problem; (3) the agency's explanation runs counter to the evidence in the administrative record; or (4) the agency's explanation is so implausible that it cannot be ascribed to a difference in view or the product of agency expertise. *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (en banc). If the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made, the decision is not arbitrary or capricious." *Cty. of Amador v. U.S. Dep't of the Interior*, 872 F.3d 1012, 1027 (9th Cir. 2017) (internal quotation marks and citation omitted).

ARGUMENT

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

With respect to recalibration, the district court held that the Service did not "rationally consider and apply the best available science" and instead "made a concession to the states to secure their participation in the Conservation Strategy." (1ER32-33). The district court relied on an untenable interpretation of the ESA, speculation about the motives of the Service, and the court's preferred approach to recalibration to support this holding. (1ER35-40).

The district court's holding on the recalibration issue should be reversed because it applied flawed reasoning in its analysis. The court erred as a matter of law because the ESA did not require the Service to consider recalibration in the delisting analysis. It erred as a matter of fact because the evidence in the administrative record does not support the court's primary theory for its holding on the recalibration issue. The court also violated a basic tenant of administrative law when it improperly substituted its judgment for that of the Service regarding recalibration. These reversible errors notwithstanding, this Court should defer to the Service's decision to approve the use of the Chao2 method for the foreseeable future because it chose a conservative approach when faced with scientific uncertainty.

A. The Service's Decision Not To Brief The Recalibration Issue On Appeal Does Not Change The Fact That The District Court's Holding On The Issue Should Be Reversed.

In its opening brief, the Service did not present argument on the recalibration issue. As a threshold matter, therefore, it is necessary to address the import (if any) of this fact.

The Service did not explain why it decided not to brief the recalibration issue. Its silence should not be viewed as an invitation to speculate about its motives and should not influence the analysis of the recalibration issue. As explained below, the law and the facts do not support the district court's holding on

the recalibration issue. The Service's decision not to engage on the issue and its unstated reasons for doing so do not change the fact that the district court's holding is legally and factually flawed and therefore should be reversed.

B. The Best Available Science Mandate Does Not Apply To Recalibration Because The Signatories' Will Use The Model-Averaged Chao2 Method For The Foreseeable Future.

The district court held that the Service violated the ESA's best science mandate when it did not require the signatories to include recalibration language in the Conservation Strategy. (1ER32-33). But the signatories made recalibration a non-issue when they committed to use the model-averaged Chao2 method for the foreseeable future. If no new population estimator will be adopted within the foreseeable future, then the Service had no reason to consider recalibration in the delisting analysis for the Yellowstone Segment.

To delist a distinct population segment, the Service must consider the five factors listed in subsection 1533(a)(1) in light of the best scientific and commercial data available and the statutory definitions of endangered species and threatened species. 16 U.S.C. § 1533(a)(1), (b), (c)(2); 50 C.F.R. § 424.11(c)-(d) (2018). The Service may delist the segment only if the best available science shows that it is no longer endangered or threatened because of extinction, recovery, or erroneous listing. 16 U.S.C. § 1533(b)(1)(A); 50 C.F.R. § 424.11(d)(2).

The definition of "threatened species" limits the temporal scope of the delisting analysis to matters occurring "within the foreseeable future." 16 U.S.C. § 1532(20). The Service, therefore, must evaluate the threats posed under each delisting factor within the foreseeable future. (2ER188).

Here, the recalibration issue will arise only if the signatories adopt a new population estimator. The signatories have agreed that they will not adopt a new population estimator within the foreseeable future, so the need for recalibration cannot occur (if at all) until sometime beyond the foreseeable future. The ESA does not require the Service to consider matters beyond the foreseeable future in a delisting analysis, (2ER188), so it acted consistent with the ESA when it did not address recalibration in the delisting analysis for the Yellowstone Segment. The Service had no reason to consider recalibration in the analysis because the signatories' commitment to use the Chao2 method for the foreseeable future made recalibration unnecessary.

In the proceedings below, the district court addressed a similar foreseeable future argument. (1ER38). The court dismissed the argument for two reasons, neither of which has merit.

First, the court found that the 2017 delisting rule "is equivocal about the commitment to Chao2, which has recognized limitations." *Id.* (citing 82 Fed. Reg. at 30513). To the contrary, the Service could not have been more

definitive about the signatories' commitment to the model-averaged Chao2 method for the foreseeable future. Table 3 in the preamble for the 2017 delisting rule states that "[t]he model-averaged Chao2 estimator will be used as the population measurement tool for the foreseeable future." (2ER112). The Service reiterated this commitment to the Chao2 method for the foreseeable future at least three other times in the preamble. (2ER94; 134; 147). In addition, the Conservation Strategy explicitly states that the model-averaged Chao2 method will continue to be used for the foreseeable future to estimate population size. (3ER262).

Second, the district court specifically rejected the notion that "the risk posed by the potential adoption of a new estimator is too speculative or distant to require discussion within the Conservation Strategy." (1ER39). It characterized the lack of a commitment to recalibration in the future as a "recognized threat to the health" of the Yellowstone Segment. *Id*.

The district court improperly characterized the adoption of a new estimator without doing recalibration as a "risk" and a "threat." In a delisting analysis, the Service evaluates "both the threats currently facing the species and the threats that are reasonably likely to affect the species in the foreseeable future" after delisting. (2ER101). To be considered a "threat" to the species, the Service must have

sufficient evidence to show that a factor "is likely to materialize" within the foreseeable future. *Id*.

To be a "threat" for purposes of the 2017 delisting rule, the adoption of a new population estimator without doing recalibration must be likely to happen in the foreseeable future. In the preamble to the 2017 delisting rule, the Service acknowledged that a new population estimator may be adopted in the future, but it did not address when that might happen. (2ER94). It also explained that no other existing population estimator will replace the model-averaged Chao2 method as the best available science. (2ER144). In addition, no evidence in the administrative record identifies a time frame for when a new estimator likely will be adopted. Thus, the adoption of a new population estimator without doing recalibration is not likely to materialize in the foreseeable future and, as a result, the implementation of a new population estimator without doing recalibration is not a threat for purposes of the 2017 delisting rule.

In the final analysis, whether the annual total population management goal should be recalibrated is a policy decision to be made when a new population estimator replaces the model-averaged Chao2 estimator (if ever). The signatories will not replace the Chao2 method (if ever) within the foreseeable future, so recalibration is a non-issue as it relates to the question of whether the Yellowstone Segment should be delisted.

By holding that the Service violated the best available science mandate with respect to recalibration, the district court ran afoul of the "within the foreseeable future" limit on the temporal scope of the Yellowstone Segment delisting analysis. Whether recalibration should be applied at some unknown point in the future is too speculative to fall within the scope of any of the delisting factors for the Segment. *See Bennett v. Spear*, 520 U.S. 154, 176 (1997) (stating that the best available science mandate ensures that the Service will not implement the ESA "haphazardly, on the basis of speculation or surmise"). This Court, therefore, should reverse the district court's holding on the recalibration issue.

C. The District Court's Analysis Of The Recalibration Issue Suffers From Three Other Primary Flaws.

In addition to the infirmities addressed above, the district court's analysis of the recalibration issue suffers from three other primary flaws. First, the evidence in the administrative record does not support the court's conclusion that the Service dropped its demand for recalibration language as a concession to the States. Second, the court acted contrary to the arbitrary and capricious standard when it disregarded facts that support the Service's decision to approve use of the Chao2 method for the foreseeable future. And, finally, the court improperly substituted its judgment for that of the Service on the recalibration issue.

1. The evidence in the administrative record does not support the district court's conclusion that political pressure from the States caused the Service to drop its demand for recalibration language.

The district court concluded that "the Service illegally negotiated away its obligation to apply the best available science in order to reach an accommodation with the states" on the recalibration issue. (1ER4). To this end, the court cited documents in the administrative record as support for its findings that: (1) "[t]he Service was aware that recalibration was a matter of significant concern"; and (2) the Service dropped its demand for the signatories to include recalibration language in the Conservation Strategy "[i]n response to political pressure from the states despite its recognition" that recalibration was important. (1ER37). (administrative record citations omitted). None of the emails cited by the court support its "significant concern … political pressure" theory.

a. The court's "significant concern" evidence is not legally or factually relevant.

The district court cited three documents in an effort to show that the Service knew recalibration was a significant concern – Documents 008087, 008546-47, and 008455-56. (1ER37). Document 008455-56 does not appear to be relevant to the district court's analysis. Based on the language quoted by the court, it appears that the court should have cited Document 008319 and Document 0000144611 instead of Document 008455-56. Although each of the

documents quoted by the court shows that then-Service Director Dan Ashe and Dr. Servheen had "concerns" regarding recalibration, their concerns were not relevant to the question of whether the Yellowstone Segment should be delisted.

Documents 008087, 008546-47, and 008319 are emails authored by Director Ashe. In these emails, he said that: (1) recalibration "is a key commitment" (WY-SER80-81); (2) the States unwillingness to commit to recalibration "is quite concerning" (WY-SER76); and (3) not having recalibration language in the Conservation Strategy "is an absolute show-stopper." (WY-SER75).

Although these emails show that Director Ashe initially wanted recalibration language in the Conservation Strategy, only the email with the "key commitment" phrase explains why. In that email, Director Ashe stated that recalibration language was necessary "to ensure that the states are committed to the basic goal of maintaining the delisted population of bears." (WY-SER80); *see also* (WY-SER72) ("[The States] must be willing to make a clear and convincing case that the delisted population will be maintained.")

Director Ashe's concern generally lacked merit because the States will be able to maintain the Yellowstone Segment population above recovery levels even if they adopt a new population estimator in the future and do not to recalibrate the total population management goal in Demographic Recovery Criterion 3.

In terms of total population size, the Yellowstone Segment is a recovered population as long as it has at least 500 bears in the Demographic Monitoring Area. (2ER95). The signatories to the Conservation Strategy have committed:

- To manage for around 674 bears in the Demographic Monitoring Area, with the flexibility to manage for as few as 600 bears or as many as 747 bears. (2ER137);
- To stop all discretionary mortality (except as necessary for human safety) if the total population size drops below 600 bears. (2ER96 (Table 2);113 (Table 3)); and
- To suspend grizzly bear hunting within the Demographic Monitoring Area if the mortality limit for any of the sex and age-based classes is met in a given year. (2ER113).

These post-delisting safeguards establish a multifaceted management buffer to prevent the Yellowstone Segment population from decreasing to the 500 bear minimum population. If the signatories adopt a new estimator and do not recalibrate, then these management safeguards will remain in place without change.[5]

[5] The 500 bear total population minimum and the 600 bear discretionary mortality cut off would not change even with recalibration because neither number depends upon the methodology used to count the number of bears in the Yellowstone Segment. (2ER93) (explaining that, in 1993, the Service eliminated Criterion 1's dependence on a specific counting method).

Thus, even if adopting a new estimator without doing recalibration results in more bears being subject to discretionary mortality each year, the signatories still would manage for a total population size of more than 600 bears in the Demographic Monitoring Area and still would halt discretionary mortality if the population drops below 600 bears or if the mortality limit for any of the sex and age-based classes is met in a given year. These post-delisting safeguards ensure that any additional amount of discretionary mortality resulting from a decision not to recalibrate will not cause the Yellowstone Segment population to drop below the minimum number of bears necessary to have a recovered population. Or, in other words, these management safeguards show that the States are committed to maintaining the Yellowstone Segment population above recovery levels after delisting.

Document 0000144611 is a copy of a May 8, 2015 email from the State game and fish departments to two regional Service officials. (WY-SER1). In this email, the States responded to an April 23, 2015 document entitled "Updated Approach to Yellowstone Recovery and Delisting." *Id*. On a copy of that email, Dr. Servheen documented his comments to the States' response. *Id*. Regarding a statement that 683 bears should be "the minimum population goal regardless of the method used to estimate the population," Dr. Servheen commented that "[t]his is

fundamentally impossible and is biologically and legally indefensible." (WY-SER1).

Later in this same comment, Dr. Servheen stated that "[i]f we accept this approach, the states could reduce 1200 bears to 683." *Id*. Thus, his "concern" was that, without recalibration, 500 plus bears potentially could be killed without the Yellowstone Segment population dropping below the annual total population management goal number. The basic concern about recalibration was that a significant number of bears might be subject to discretionary mortality annually if a new population estimator resulted in higher annual population estimates and the annual total population management goal number was not also adjusted upward by recalibration.[6] *See, e.g.* (WY-SER72) (a Department of the Interior official explaining the concern.).

Dr. Servheen's concern about future discretionary mortality falls flat when viewed in light of the States' commitments regarding the post-delisting population management of the Yellowstone Segment. In addition to the annual total population management goal, the States have agreed to apply specific sex and age-based annual total mortality limits annually. (2ER95; 96 (Table 2); 112-13 & Table 3). The States will suspend grizzly bear hunting within the

[6] Dr. Servheen eventually said that the decision to adopt the model-averaged Chao2 method for the foreseeable future was "OK." (WY-SER130).

Demographic Monitoring Area if the total annual mortality limit for any of the sex and age-based classes is met at any time during the year. (2ER113). These more targeted management commitments assure that a significant number of grizzly bears will not be subjected to discretionary mortality in a given year. Ultimately, however, recalibration is a non-issue because the signatories are committed to using the model-averaged Chao2 method for the foreseeable future.

Dr. Servheen's concerns about annual discretionary mortality might be relevant if the ESA required the States to manage the delisted Yellowstone Segment population for the maximum number of bears possible. But it does not. As this Court has recognized, "[a] major goal of the ESA's protections is recovery of threatened and endangered species such that they can be removed from the list." *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1024 (9th Cir. 2011) (citations omitted). Thus, the ESA focuses on population recovery, not population maximization.

To the extent that Director Ashe and Dr. Servheen had "concerns" regarding recalibration, their concerns were not relevant to the question of whether the Yellowstone Segment should be delisted. Accordingly, the emails quoted by the district court do not support its "significant concern" theory.

b. The evidence cited by the district court does not support its "political pressure" theory.

The court cited four documents from the administrative record to support its finding that the Service relented to political pressure from the States – 007744; 063366; 063383; and 063377. (1ER37-38). Either individually or collectively, these documents cannot reasonably be viewed as evidence that political pressure from the States caused the Service to back away from demanding that the signatories include recalibration language in the Conservation Strategy.

Document 007744 comes from the meeting minutes of the November 4, 2016, Yellowstone Ecosystem Subcommittee Conservation Strategy meeting. (WY-SER108-12). It is one page of a five page document. This specific document says nothing that reasonably could be construed as support for the finding that political pressure from the States caused the Service to drop its recalibration demand.

Document 063366 is a November 16, 2016 email from Dr. Servheen to Dr. Jennifer Fortin-Noreus (a member of the grizzly bear recovery team) regarding the various proposed changes to the Conservation Strategy. (WY-SER130-137). Of his eleven separate comments, three appear to be directed to the decision to follow the model-averaged Chao2 estimator for the foreseeable future, with two categorized as "OK" and one categorized as "Bad." (WY-SER130).

The two comments in the "OK" category were: (1) "CS to be in place for the 'foreseeable future'. Whatever that is."; and (2) "Inferring that MA chao2 will be used and no new method will be used (I think this is inferred)." *Id*. In the "Bad" category, Dr. Servheen said: "Ignores what will happen if a new estimator becomes available. It is obvious what the states plan is." *Id*. (emphasis omitted).

Dr. Servheen's comments say nothing about the States possibly influencing the Service's decision regarding the recalibration language. In fact, despite his apparent unhappiness about the proposed language changes as a whole, he conceded that he was "OK" with the decision to adopt the model-averaged Chao2 estimator for the foreseeable future.

Document 063383 is an August 22, 2016 email chain between Dr. Servheen and Dr. Fortin-Noreus. (WY-SER71). In response to Dr. Servheen's question about the status of the recalibration issue, Dr. Fortin-Noreus explained that "[i]t has been elevated to Ashe, Jarvis and Bean directly speaking to the state Governors. I'm not sure when the call is supposed to happen." *Id.*

The district court presumably viewed this email chain as proof of political pressure because it referred to politically appointed decision-makers from the Service and the elected Governors of the States. But the timing of the email chain makes that inference unreasonable.

The emails in the chain were sent in late August 2016. Yet, on October 27, 2016, Director Ashe authorized the Service to propose alternative recalibration language at the November 4, 2016 Yellowstone Ecosystem Subcommittee meeting and criticized the States for being unwilling to commit to the alternative language. (WY-SER76). If Director Ashe discussed recalibration with the Governors in late August, then his October 28 email confirms that, even if the discussion was political in nature, he was not persuaded to change his views on recalibration.

To conclude its point regarding the Service's alleged political concession to the States, the district court explained that

> [a]s the Service's former grizzly bear coordinator wrote at the time, the Service's willingness to negotiate away this important provision constitutes "a violation of the mandate of the ESA that the Service implement adequate regulatory mechanisms prior to delisting. There cannot be a vote by other agencies to determine if the Service follows the ESA …."

(1ER37-38)(quoting WY-SER77).

This statement by the district court does not accurately reflect the substance of the email it quoted. Document 063377 is an October 28, 2016 email from Dr. Servheen to Dr. Fortin-Noreus. (WY-SER77-79). After Dr. Fortin-Noreus informed Dr. Servheen that the Yellowstone Ecosystem Subcommittee was going to vote on the most recent recalibration language proposed by the Service, he responded as follows:

> **If they vote to accept this**, it is a violation of the mandate of the ESA that the Service implement adequate regulatory mechanisms prior to delisting.

> **There cannot be a vote by other agencies to determine if the Service follows the ESA** any more than the USFS can allow other agencies to vote whether the USFS will follow NFMA.

(WY-SER 77) (emphasis added).

In this email, Dr. Servheen said nothing about a negotiated compromise with the States. The email language quoted by the district court refers back to the phrase "If they vote to accept this …." Viewed in its proper context, this language expressed Dr. Servheen's personal opinion that the Service should have the exclusive or final say on the recalibration question, not his belief that the Service improperly compromised with the States.

The "vote" referred to in the email was the Subcommittee vote on recalibration language proposed by the Service. If Dr. Servheen believed the Service had improperly negotiated away some important aspect of recalibration, then he could have (and almost assuredly would have) said so. But he did not. Instead, he complained about the fact that "other agencies" (including three federal agencies) were being allowed to vote on whether to approve or disapprove of the recalibration language proposed by the Service. By taking the language quoted from the email out of context, the district court misrepresented the meaning of it.

As a practical matter, the district court's theory that the States could apply political pressure on the Service by threatening not to sign the Conservation Strategy makes no sense. The States worked diligently with the Service and other

federal agencies to make it possible for the Service to adopt the delisting rule in 2007. In that process, the States made numerous commitments (for example, agreeing to participate in the Conservation Strategy) to maintain the Yellowstone Segment as a recovered population for the foreseeable future.

After the district court set aside the 2007 delisting rule, the States actively participated in the appeal before this Court in an attempt to get that decision reversed. *See generally Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015 (9th Cir. 2011). After this Court affirmed the district court's decision to vacate the 2007 delisting rule, the States worked diligently with the other signatories to the Strategy to make it possible for the Service to adopt the 2017 delisting rule. In doing so, the States made numerous commitments (for example, the tri-state mortality management memorandum of agreement) to maintain the Yellowstone Segment as a recovered population for the foreseeable future.

These efforts confirm what the Service has known for at least two decades – the States believe that the Yellowstone Segment should be delisted and want the Service to delist the Segment. Dating back to the 2007 delisting rule, the Service made it clear that the Conservation Strategy will play a prominent role in the post-delisting management of the Segment. And during the discussions leading to the adoption of the 2017 delisting rule, the States knew that if they did not sign the Strategy, then the Service likely would have stopped the delisting process. Given

this backdrop, a threat to not sign the Strategy would have been an empty threat at best because it would have been contrary to the States' interests.

The evidence in the administrative record shows that the States had legitimate, non-political concerns about recalibration, including concerns about when an acceptable new estimator would be available (if ever) and whether recalibration actually could be done. (WY-SER149). Given these uncertainties, the States were right (both legally and factually) to push back against the Service on the recalibration issue.

The evidence also confirms that the Chao2 method is the best available science and will be for the foreseeable future. Although the Service advocated for recalibration throughout much of the process to amend the Conservation Strategy, it ultimately approved an approach that complies with the best available science mandate. Thus, the Service's decision to approve use of the Chao2 method for the foreseeable future was influenced by the legal requirements for delisting in the ESA, and not politics. The district court's reasoning for its "political pressure" theory has no support in the administrative record and must be reversed.

2. The district court did not follow the arbitrary and capricious standard of review when it addressed the recalibration issue.

The district court turned the arbitrary and capricious standard on its head when it relied on the foregoing emails to support its holding on the recalibration

issue. An agency's decision is not arbitrary and capricious as long as it "considered the relevant factors and articulated a rational connection between the facts found and the choice made …." *Cty. of Amador*, 872 F.3d at 1027. Here, the court glossed over facts that supported the Service's decision to approve use of the Chao2 method for the foreseeable future. (2ER143-45). It also disregarded the Service's explanation of why recalibration was removed from the Conservation Strategy. (2ER147). Instead, the court sought out any evidence it could find in the administrative record to support its view that the Service should have forced the signatories to include recalibration language in the Conservation Strategy. In doing so, the court committed reversible error because it acted outside of the limits on judicial review imposed by the Administrative Procedure Act.

3. The district court improperly substituted its judgment for that of the Service on the recalibration issue.

After acknowledging the speculative nature of how recalibration specifically will work in the future, the district court suggested that the signatories should have included a general commitment to recalibration in the Conservation Strategy. (1ER38). The court did not support this statement with cogent analysis or citation to pertinent legal authority. By making this legally and factually unsupported comment, the district court simply chose its preferred approach over the Service's approach. Under the Administrative Procedure Act, the district court cannot substitute its judgment for that of the Service. *Greater Yellowstone Coal.*, 665 F.3d

at 1023. As a result, the district court's holding on the recalibration should be reversed.

D. This Court Should Defer To The Service's Decision To Approve Use Of The Chao2 Method For The Foreseeable Future Because The Service Approved A Conservative Approach In The Face Of Scientific Uncertainty.

Although the Service and the States debated whether recalibration language should be included in the Conservation Strategy, the preamble to the 2017 delisting rule confirms that the Service chose the known (the conservative, best science available model-averaged Chao2 method) over the unknown (when a different population estimator will be good enough to replace the Chao2 method). In the preamble, the Service:

- Acknowledged that the Chao2 estimator "is the best science that is currently available and that can apply under the current monitoring schemes." (2ER143).
- Described the Chao2 method as "highly conservative" or "very conservative," and extolled the virtues of using that method for the foreseeable future. (2ER172-73).
- Explained that the other existing population estimators are not better science than the Chao2 method, and stated that those estimators are "currently not

available with the data we have, [and] the annual implementation of these methods would be prohibitive both in costs and logistics." (2ER144).

The Service ultimately concluded that replacing the Chao2 estimator "is not a foreseeable event" because the signatories will use it "as far into the future as we can reliably envision." (WY-SER145). Thus, the Service had no reason to believe that a new population estimator would replace the Chao2 method anytime soon, if ever.

Given the uncertainty about when (if ever) a new population estimator might be developed that could supplant the Chao2 method as the best available science for estimating total population size, the Service approved an approach that assures the Yellowstone Segment population will be managed in a conservative manner for the foreseeable future. (2ER172). This Court should defer to the Service's decision to approve use of the Chao2 method for the foreseeable future because the Service approved a conservative approach in the face of scientific uncertainty. *See San Luis & Delta-Mendota Water Auth. v. Jewel*, 747 F.3d 581, 626 (9th Cir. 2014) (The Service's decision "to use a more conservative data set, when necessary, is exactly the sort that [this Court] afford[s] agencies discretion to make.").[7]

[7] This Court also should defer to the Service's decision to approve use of the Chao2 method for the foreseeable future because the Service reasonably explained the decision and disclosed the limitations of the Chao2 method. *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 679 (9th Cir. 2016) (citation and internal quotation marks omitted) (A reviewing court "must defer to the

II. 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.

Relying heavily on the reasoning in the *Humane Society* case, the district court held that the Service's delisting analysis for the Yellowstone Segment was arbitrary and capricious because the Service did not consider the "the legal and functional effect" of the delisting on other grizzly bear populations living in the continental United States. (1ER31-32). It explained that the Service must conduct "'a comprehensive review of the entire listed species and its continuing status'" when it delists a distinct population segment. (1ER30) (quoting *Humane Society*, 865 F.3d at 601).

The district court's holding on the delisting analysis issue should be reversed because the Service's decision to perform a full delisting analysis for the Yellowstone Segment and not for the other populations is entitled to deference under step two of the familiar *Chevron* framework.[8] But if this Court agrees with the district court on this issue, the 2017 delisting rule should be remanded to the Service without vacatur.

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agency's interpretation of complex scientific data so long as the agency provides a reasonable explanation for adopting its approach and discloses the limitations of that approach.").

[8] *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

A. The ESA Does Not Require The Service To Perform A Full Delisting Analysis For The Other Grizzly Bear Populations In The Continental United States As A Part Of The Yellowstone Segment Delisting Analysis.

In the preamble to the 2017 delisting rule, the Service explained that, after the 2017 delisting rule takes effect, the other grizzly bear populations in the continental United States "will remain listed as a threatened species under the Act. Therefore, consideration and analyses of grizzly bear populations elsewhere … is outside the scope of this rulemaking." (2ER127); *see also* (2ER203-05; 209).

Based on its construction of the term "species" as defined in the ESA, the Service determined that it was not necessary to do a full status review of the other grizzly bear populations as a part of the delisting analysis for the Yellowstone Segment. (2ER202-03). According to the Service, if it designates a part of a broader species listing as a distinct population segment, the segment becomes a "species" for purposes of the ESA. (Solicitor Op. M-37018, at 3); *see also* (2ER202-03). When that happens, both the broader species and the segment are "species" that may be uplisted, downlisted, or delisted independent of one another. (2ER202-03).

The Service's construction of "species" is entitled to deference under step two of *Chevron*. In *Chevron* step two, this Court must determine whether the Service's interpretation "is based upon a permissible construction of the statute." *Nat. Res. Def. Council v. U.S. EPA*, 526 F.3d 591, 602 (9th Cir. 2008).

"If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Humane Soc'y of the U.S.. v. Locke*, 626 F.3d 1040, 1054 (9th Cir. 2010) (citation and internal quotation marks omitted).

For the Service's construction to be reasonable, the definition of "species" must be divisible in the sense that a distinct population segment can be a "species" independent of the broader species listing. In the ESA, Congress defined the term "species" as follows:

> The term "species" **includes** any subspecies of fish or wildlife or plants, and **any distinct population segment of any species** of vertebrate fish or wildlife which interbreeds when mature.

16 U.S.C. § 1532(16) (emphasis added). Whether this definition reasonably can be construed as being divisible depends upon the meaning of the word "includes" in the context of the definition.

Undefined words in a statute should be given their common and ordinary meaning. *Foxgord v. Hischemoeller*, 820 F.2d 1030, 1032 (9th Cir. 1987). To determine the common and ordinary meaning of the word "includes," this Court should look to the dictionary definition of the word. *See id*. In this context, the word "include" can mean a component of a larger group. *Webster's Third New Int'l Dictionary* 1143 (1986). Applying this definition, a distinct population

segment exists as an entity that is a part of, but also separable from, the broader listed species. Thus, the phrase "includes … any distinct population segment" reasonably can be interpreted to mean that a distinct population segment is a "species" independent from a broader species listing. Or, in other words, when the Service designates a distinct population segment from a broader species listing, the segment becomes a "species" for purposes of the ESA.

The Service's interpretation also is reasonable because it gives effect to the congressional intent of the ESA. Allowing the Service to address the listing status of a distinct population segment without also contemporaneously doing so for the broader listed species furthers the ESA goal of returning management of a listed species to the states once that species has recovered. *See Alaska v. Lubchenco*, 723 F.3d 1043, 1054 (9th Cir. 2013) (citation omitted) ("The goal of the ESA is not just to ensure survival, but to ensure that the species recovers to the point that it can be delisted."); *Greater Yellowstone Coal.*, 665 F.3d at 1024. The Service's interpretation assures that a recovered segment will not remain listed because of factors unrelated to the recovery status of the segment. Its interpretation also allows it to conserve agency resources. (2ER204).

When Congress added "distinct population segment" to the definition of "species" in 1978, it did not define the term. And the scant legislative history for the 1978 amendment provides little insight into the congressional intent for adding

the term to the definition. (Solicitor Opinion M-37018, at 12-13). Given the dearth of congressional guidance, this circumstance is tailor-made for the Service to exercise its expertise in matters involving the recovery and delisting of species. For years the Service has construed the ESA as allowing it to delist a distinct population segment independent of the broader species listing. The Service based this construction on a permissible construction of the ESA and, as a result, this Court must defer to the construction under *Chevron* step two.

If this Court affords *Chevron* deference to the Service's construction of the word "species," then the district court's holding on the delisting analysis issue cannot survive the unambiguous language in the ESA. The ESA requires the Service to delist a "species" when the species has recovered and no longer warrants protection under the ESA. 16 U.S.C. § 1533(a)(1), (b), (c)(2). It also requires the Service to perform a five factor analysis (status review) before it delists a "species." 16 U.S.C. § 1533(a)(1), (b), (c)(2).

When the Service designated the Yellowstone Segment, the Segment became a "species" separate from the broader species listing. Thus, the Service complied with the requirements of the ESA when it performed the delisting analysis for the Segment.

Under the district court's view of the ESA, the Service also must perform "a comprehensive review" (presumably a status review) for a different

"species" – the broader species of grizzly bear – as a part of the Yellowstone Segment delisting analysis. (1ER15, 30) (citation omitted). No provision in the ESA or its implementing regulations reasonably can be interpreted as requiring the Service to perform a delisting analysis for a different "species" in the delisting analysis for the Yellowstone Segment. The district court's holding on the delisting analysis issue contravenes the plain language of the ESA and therefore must be reversed.

The district court's holding also cannot stand because it creates a new procedural requirement for the Service to follow when it delists a distinct population segment. In reviewing a delisting rule, the reviewing court may not impose procedural requirements not explicitly established in the ESA. *Lands Council*, 537 F.3d at 993. By requiring the Service to perform a second delisting analysis beyond what the ESA requires, the court improperly imposed an additional procedural requirement not contemplated by the ESA.

B. If This Court Affirms The District Court Holding On The Delisting Analysis Issue, It Should Remand The 2017 Delisting Rule Without Vacatur.

For the reasons stated above, this Court should reverse the district court's holding on the delisting analysis issue. But if this Court agrees with the district court on this issue, it should remand the 2017 delisting rule without vacatur.

The remedy of remand without vacatur applies only in rare or limited circumstances. *Humane Soc'y*, 626 F.3d at 1054 n.7; *Pollinator Stewardship Council v. U.S. EPA*, 806 F.3d 520, 532 (9th Cir. 2015). This Court may order remand without vacatur when the agency readily can cure the defect in its explanation of its decision or could adopt the same rule if it complies with the procedural rules. *Humane Soc'y*, 626 F.3d at 1054 n.7; *Pollinator Stewardship Council*, 806 F.3d at 532.

Here, the Service has completed an analysis of how delisting the Yellowstone Segment will affect the other grizzly bear populations living in the continental United States. 83 Fed. Reg. 18737-743 (April 30, 2018). It determined that the other grizzly bear populations should remain listed as threatened and that delisting the Segment will not significantly affect those populations. 83 Fed. Reg. at 18739-42. If the 2017 delisting rule is remanded, the Service can readily cure the defect identified by the district court and likely will adopt the same rule after it cures the defect. Moreover, in its opening brief, the Service informed this Court that it has started work on this particular issue on remand. (Fed. Opening Br. at 15). This appeal thus presents the rare or limited circumstance where remand without vacatur is the appropriate remedy.

As a practical matter, remanding the 2017 delisting rule without vacatur will not affect the recovery status of the Yellowstone Segment. The only legitimate

concern about leaving the delisting rule in place arises from the possibility that some bears in the population may be lost to discretionary mortality. The total population size of the Segment currently is around 700 bears. The post-delisting management safeguards make it unlikely that the population will drop below 600 bears within the foreseeable future. In terms of total population, the Segment qualifies as recovered as long as it has at least 500 bears living in the Demographic Monitoring Area. Reinstating the 2017 delisting rule should not adversely affect its status as a recovered population because the Segment population likely will not drop below 600 bears within the foreseeable future.

III. 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.

The district court held that the Service did not properly analyze the threat geographic isolation poses to the genetic health of the Yellowstone Segment. (1ER42). It found fault with two aspects of the Service's analysis. First, the court concluded that the Service "misread the scientific studies it relied upon, failing to recognize that all evidence suggests that the long-term viability of the Greater Yellowstone grizzly is far less certain absent new genetic material." (1ER41). Second, the court determined that "there is no regulatory mechanism in place to

address the threat" posed by the geographic isolation of the Yellowstone Segment. (1ER47).

In its opening brief, the Service argues that: (1) the administrative record supports the Service's conclusions that genetic diversity is not a threat to the Yellowstone Segment for the foreseeable future; (2) the district court improperly substituted its own interpretation of the Miller and Waits study and the Kamath study for that of the Service; and (3) the district court improperly substituted its judgment for that of the Service regarding the what should be done to manage the long term genetic health of the Yellowstone Segment. (Fed. Opening Br. At 28-37). Wyoming generally agrees with those arguments and will not repeat similar arguments here.

The district court's holding on the translocation issue also should be reversed because the evidence in the administrative record contradicts the district court's finding regarding the perceived lack of regulatory mechanisms to address the potential long term effects of isolation on the Yellowstone Segment. After delisting, the signatories to the Conservation Strategy will implement a combination proactive/reactive management approach to address the longer term genetic health of the Yellowstone Segment. On the proactive side, Montana has committed to manage discretionary mortality in the potential migration corridor

between the Yellowstone Segment and the Northern Continental Divide Ecosystem to retain the opportunity for movement of bears between the two ecosystems. *Id*.

On the reactive side, the Wyoming Grizzly Bear Management Plan specifically states that, "[s]hould genetic issues become a concern in the future, translocation of genetic material into the [Yellowstone Segment] will be considered." (WY-SER66).[9] The federal signatories also will provide for translocation should the need arise. In the preamble, it stated that a decrease in the genetic diversity of the Yellowstone Segment "will be … responded to accordingly with translocation of outside grizzly bears" into the segment. (2ER117). This statement is definitive enough to commit the federal signatories to provide for translocation (if necessary) into areas where the federal government has exclusive federal wildlife management jurisdiction (such as Yellowstone National Park). *See Defs. of Wildlife v. Zinke*, 849 F.3d 1077, 1085 (D.C. Cir. 2017) (citation omitted) (explaining when statements in a Federal Register preamble may be legally binding).

[9] Wyoming's commitment to consider translocation if needed is significant because 54% of the Demographic Monitoring Area outside of National Park Service lands will be subject to the management jurisdiction of the Wyoming Game and Fish Commission (through the Wyoming Game and Fish Department) after delisting. (WY-SER68).

The district court did not find that the proactive/reactive management approach will not work or is biologically unsound. In fact, it overlooked the explicit commitments to translocation stated in the preamble and the Wyoming grizzly bear management plan. The court's partially informed view regarding translocation amounts to nothing more than its preference on how genetic health in the Yellowstone Segment should be managed at some point in time beyond the foreseeable future. The district court did not have the requisite biological expertise to make this call. It also did not have legal authority to impose its preferred approach. After all, a reviewing court cannot "overturn the agency decision because it disagrees with the decision …." *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010). This Court, therefore, should reverse the district court's holding on the translocation issue.

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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 reinstate the 2017 delisting rule and to leave that rule in place while the Service completes the remand process.

Date: June 7, 2019

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STATEMENT OF RELATED CASES

Undersigned counsel is not aware of any related cases pending before this Court.

Date: June 7, 2019

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

Except for the following, all applicable statutes are contained in the Addendum of the Opening Brief for the Federal Appellants.

50 C.F.R. § 424.11 (2018) 1a

Subpart B—Revision of the Lists

§ 424.11 Factors for listing, delisting, or reclassifying species.

(a) Any species or taxonomic group of species (e.g., genus, subgenus) as defined in § 424.02(k) is eligible for listing under the Act. A taxon of higher rank than species may be listed only if all included species are individually found to be endangered or threatened. In determining whether a particular taxon or population is a species for the purposes of the Act, the Secretary shall rely on standard taxonomic distinctions and the biological expertise of the Department and the scientific community concerning the relevant taxonomic group.

(b) The Secretary shall make any determination required by paragraphs (c) and (d) of this section *solely* on the basis of the best available scientific and commercial information regarding a species' status, without reference to possible economic or other impacts of such determination.

(c) A species shall be listed or reclassified if the Secretary determines, on the basis of the best scientific and commercial data available after conducting a review of the species' status, that the species is endangered or threatened because of any one or a combination of the following factors:

(1) The present or threatened destruction, modification, or curtailment of its habitat or range;

(2) Over utilization for commercial, recreational, scientific, or educational purposes;

(3) Disease or predation;

(4) The inadequacy of existing regulatory mechanisms; or

(5) Other natural or manmade factors affecting its continued existence.

(d) The factors considered in delisting a species are those in paragraph (c) of this section as they relate to the definitions of endangered or threatened species. Such removal must be supported by the best scientific and commercial data available to the Secretary after conducting a review of the status of the species. A species may be delisted only if such data substantiate that it is neither endangered nor threatened for one or more of the following reasons:

(1) *Extinction.* Unless all individuals of the listed species had been previously identified and located, and were later found to be extirpated from their previous range, a sufficient period of time must be allowed before delisting to indicate clearly that the species is extinct.

(2) *Recovery.* The principal goal of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service is to return listed species to a point at which protection under the Act is no longer required. A species may be delisted on the basis of recovery only if the best scientific and commercial data available indicate that it is no longer endangered or threatened.

(3) *Original data for classification in error.* Subsequent investigations may show that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error.

(e) The fact that a species of fish, wildlife, or plant is protected by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (see part 23 of this title 50) or a similar international agreement on such species, or has been identified as requiring protection from unrestricted commerce by any foreign nation, or to be in danger of extinction or likely to become so within the foreseeable future by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish, wildlife, or plants, may constitute evidence that the species is endangered or threatened. The weight given such evidence will vary depending on the international agreement in question, the criteria pursuant to which the species is eligible for protection under such authorities, and the degree of protection afforded the species. The Secretary shall give consideration to any species protected under such an international agreement, or by any State or foreign nation, to determine whether the species is endangered or threatened.

(f) The Secretary shall take into account, in making determinations under paragraph (c) or (d) of this section, those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.