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.*,
Plaintiff-Appellees,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendant-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-00016, The Honorable Dana C. Christensen

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INTERVENOR-DEFENDANT-APPELLANTS WYOMING FARM BUREAU FEDERATION; WYOMING STOCK GROWERS ASSOCIATION; CHARLES C. PRICE; AND W&M THOMAN RANCHES, LLC'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

The undersigned attorney certifies the following:

1. Intervenor-Defendant-Appellant Wyoming Farm Bureau Federation is a non-profit, membership association incorporated in the State of Wyoming. Wyoming Farm Bureau Federation is not publicly traded and has no parent corporation. There is no publicly held corporation that owns ten percent or more of its stock.

2. Intervenor-Defendant-Appellant Wyoming Stock Growers Association is a non-profit, membership association incorporated in the State of Wyoming. Wyoming Stock Growers Association is not publicly traded and has no parent corporation. There is no publicly held corporation that owns ten percent or more of its stock.

3. Intervenor-Defendant-Appellant W&M Thoman Ranches, LLC is a for-profit, member owned and operated company, organized in the State of Wyoming. W&M Thoman Ranches, LLC is not publicly traded and has no parent corporation. There is no publicly held corporation that owns ten percent or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

GLOSSARY OF ACRONYMS AND ABBREVIATIONS 1

INTRODUCTION 2

JURISDICTIONAL STATEMENT 5

STATEMENT OF THE ISSUES 6

STATEMENT REGARDING ADDENDUM 6

STATEMENT OF THE CASE 7

I. HISTORICAL BACKGROUND 7

II. FACTUAL BACKGROUND 8

III. PROCEDURAL BACKGROUND 11

SUMMARY OF ARGUMENT 12

STANDARD OF REVIEW 14

ARGUMENT 16

I. FWS IS NOT REQUIRED TO ANALYZE THE IMPACT OF DESIGNATING AND DELISTING A DISTINCT POPULATION SEGMENT ON THE “REMNANT POPULATION” 16

A. Designating a Distinct Population Segment Does Not Affect the Legal Status of the “Remnant Population” 17

B. FWS is Not Required to Examine the “Remnant Population” When Delisting a Distinct Population Segment 22

II. THE DISTRICT COURT ERRED IN SUBSTITUTING ITS JUDGMENT FOR THAT OF FWS WHEN THE COURT REINTERPRETED SCIENCE FWS RELIED ON TO SUPPORT ITS SCIENTIFIC CONCLUSIONS 25

CONCLUSION 30

STATEMENT OF RELATED CASES 31

CERTIFICATE OF COMPLIANCE 32

CERTIFICATE OF SERVICE 33

ADDENDUM

TABLE OF AUTHORITIES

Cases

Alaska Oil and Gas Association v. Jewell,
815 F.3d 544 (9th Cir. 2016)....27

Alaska Oil and Gas Association v. Pritzker,
840 F.3d 671 (9th Cir. 2016).... 26, 29, 30

Alaska v. Lubchenco,
723 F.3d 1043 (9th Cir. 2013).... 22, 23

Am. Trucking Ass'ns, Inc. v. City of Los Angeles,
559 F.3d 1046 (9th Cir. 2009)....16

Arizona ex rel. Darwin v. U.S. Envtl. Prot. Agency,
852 F.3d 1148 (9th Cir. 2017)....27

Asarco, Inc. v. U.S. Envtl. Prot. Agency,
616 F.2d 1153 (9th Cir. 1980)....28

Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.,
462 U.S. 87 (1983)....25

Cent. Ariz. Water Conservation Dist. v. U.S. Envtl. Prot. Agency,
990 F.2d 1531 (9th Cir. 1993)....15

Defenders of Wildlife v. Babbit,
958 F.Supp. 670 (D.D.C. 1997)....13

Earth Island Institute v. Hogarth,
494 F.3d 757 (9th Cir. 2007)....28

Forest Guardians v. U.S. Forest Serv.,
329 F.3d 1089 (9th Cir. 2003)....15

Greater Yellowstone Coal. v. Servheen,
665 F.3d 1015 (9th Cir. 2011).. 10, 14, 15

Greater Yellowstone Coal. v. Servheen,
672 F. Supp. 2d 1105 (D. Mont. 2009)...9

Humane Society of the United States v. Zinke,
865 F.3d 585 (D.C. Cir. 2017) .... passim

Marathon Oil Co. v. United States,
807 F.2d 759 (9th Cir. 1986)...14

Marsh v. Or. Natural Res. Council,
490 U.S. 360 (1989) 25

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 15

N. Plains Res. Council, Inc. v. Surface Transp. Bd.,
668 F.3d 1067 (9th Cir. 2011)..26

National Ass'n of Home Builders v. Norton,
340 F.3d 835 (9th Cir. 2003)...15

Native Ecosystems Council v. Dombeck,
304 F.3d 886 (9th Cir. 2002)...15

Native Ecosystems Council v. Weldon,
697 F.3d 1043 (9th Cir. 2012).. 25, 26, 29

Nev. Land Action Ass'n v. U.S. Forest Serv.,
8 F.3d 713 (9th Cir. 1993)...14

Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.,
475 F.3d 1136 (9th Cir. 2007)..15

Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric., 415 F.3d 1078 (9th Cir. 2005) 28

San Luis & Delta–Mendota Water Auth. v. Locke,
776 F.3d 971 (9th Cir. 2014).. 16, 27

Selkirk Conservation Alliance v. Forsgren,
336 F.3d 944 (9th Cir. 2003)..15

Suever v. Connell,
579 F.3d 1047 (9th Cir. 2009)..14

Sw. Center for Biological Diversity v. U.S. Bureau of Reclamation,
143 F.3d 515 (9th Cir. 1998)..28

The Lands Council v. McNair,
537 F.3d 981 (9th Cir. 2008)..16

Trout Unlimited v. Lohn,
559 F.3d 946 (9th Cir. 2009)..15

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008) 16

Statutes

16 U.S.C. § 1531(b) 7

16 U.S.C. § 1532 7

16 U.S.C. § 1532(16) 17, 23

16 U.S.C. § 1533 .... 8, 23

16 U.S.C. § 1533(a) 22

16 U.S.C. § 1540(g) 5

28 U.S.C. § 1291 5

28 U.S.C. § 1331 5

28 U.S.C. § 1346 5

28 U.S.C. § 1362 5

28 U.S.C. § 1367 5

42 U.S.C. § 2000bb-1(c) 5

5 U.S.C. § 551 5

5 U.S.C. § 701 5

5 U.S.C. § 706(2)(A) 15

Rules

FRAP 28(i) 6

FRAP 4(a)(1)(B) 5

Federal Register

83 Fed. Reg. 18,737 (Apr. 30, 2018) 21

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

APA	Administrative Procedure Act
DPS	Distinct Population Segment
E.R.	Federal Appellants' Excerpts of Record
ESA	Endangered Species Act
FWS	U.S. Fish and Wildlife Service
GYE	Greater Yellowstone Ecosystem
NCDE	Northern Continental Divide Ecosystem
NMFS	National Marine Fisheries Service

INTRODUCTION

This case presents the serious question of whether a high-visibility species can ever successfully be removed from the federal List of Endangered and Threatened Wildlife—even when that species is completely recovered.

The grizzly bear is an icon of the West and the American frontier. Our nation has idealized the grizzly bear for generations. The grizzly population living in the Greater Yellowstone Ecosystem ("GYE") is also a success story. It should be an exemplar for the positive impact the Endangered Species Act ("ESA") can have on our national conservation efforts.

Unfortunately, the U.S. Fish and Wildlife Service ("FWS") along with Idaho, Montana, and Wyoming, all of whom have spent over twenty years of work and countless resources protecting and recovering the GYE grizzly bear population, are being kept from enjoying their success. Worse, FWS and the states are being prevented from effectively managing the now ever-expanding GYE grizzly bear population. Even though the GYE grizzly bear population has met every recovery and conservation goal set for the population, environmentalist organizations, tribes, and the courts keep moving the goalposts.

Two separate presidential administrations have recognized the success of the recovery efforts and attempted to delist the GYE grizzly bear. This Court halted the first—President Obama's 2007 delisting attempt—in 2011. This Court determined,

based on the research compiled by FWS and the text of the ESA, that FWS failed to examine the potential impact of the loss of what was thought to be a major food source on the GYE grizzly bear, whitebark pine. This Court based its decision on the clear requirements set forth by the ESA.

That is not the issue presented to this Court now. Here, Plaintiff-Appellees asked the district court to invalidate FWS's designation and delisting of the GYE grizzly bear distinct population segment ("DPS") by imposing *new* requirements on the agency—requirements not set forth by Congress or the ESA. At issue here, Plaintiff-Appellees claimed FWS must examine the effect of delisting a DPS on the "remnant population," both for fear of stranding the "remnant population" in some sort of legal loophole and to ensure the delisting would not negatively impact the "remnant." Further, Plaintiff-Appellees asserted that FWS failed to appropriately support its scientific conclusion that the long-term genetic health of the GYE grizzly bear did not necessitate mandatory translocation or natural connectivity between populations.

The district court erred in agreeing with Plaintiff-Appellees. There is no statutory requirement that FWS examine the effect of delisting a DPS on the "remnant population." Designating a DPS neither strands the "remnant population" in legal limbo—as it maintains the "remnant's" original listing designation—nor does the designation create a subservient population requiring FWS to examine the

effect of changing the DPS's listing status on the "remnant population"—as the DPS identifies an entirely distinct "species," as defined by the ESA, separate and apart from the "remnant." Further, while unconditional judicial deference to agency decision-making is rightly an area of particular concern, agency deference is most appropriate when the court reviews scientific and technical conclusions within the expertise of the particular agency—a point that this Court has long recognized.

This Court should not perpetuate the district court's errors. The ESA is a robust piece of legislation and this Court need not create new law simply to place roadblocks in the way of delisting a recovered species. While the grizzly bear is an icon, the rules should not change just because the species before the Court is more charismatic than another.

We should be celebrating the success of the GYE grizzly bear and commending FWS and the states for working together in such a well-executed conservation effort. Instead, we must now question whether such conservation efforts are worthwhile if those efforts are always doomed to fail. This Court should not move the goalposts.

JURISDICTIONAL STATEMENT

Plaintiffs in the six consolidated cases at the U.S. District Court for the District of Montana allege that court had jurisdiction pursuant to, *inter alia*, 28 U.S.C. § 1331; 5 U.S.C. § 701 *et seq*.; and 16 U.S.C. § 1540(g). No. 17-00089, ECF No. 22, ¶ 15; No. 17-00117, ECF No. 1, ¶ 9; No. 17-00118, ECF No. 1, ¶ 3; No. 17-00119, ECF No. 1, ¶ 12; No. 17-00123, ECF No. 1, ¶ 4; No. 18-00016, ECF No. 1, ¶ 9).[1]

The district court entered final judgment on all claims before it on October 23, 2018. 1 E.R. 1.[2] Pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B), Intervenor-Defendant-Appellants Wyoming Farm Bureau Federation; Wyoming Stock Growers Association; Charles C. Price; and W&M Thoman Ranches, LLC (collectively, "Ranchers") timely filed a Notice of Appeal on December 21, 2018. 2 E.R. 54. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

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[1] In addition, Plaintiffs in Case No. 17-00089 allege jurisdiction pursuant to 28 U.S.C. §§ 1346, 1362, and 1367, as well as 42 U.S.C. § 2000bb-1(c). No. 17-00089, ECF No. 22, ¶ 15. Plaintiffs in Case No. 17-00119 do not assert jurisdiction pursuant to 5 U.S.C. § 701 *et seq*. No. 17-00119, ECF No. 1, ¶ 12–15. Plaintiffs in Case No. 17-00123 assert jurisdiction pursuant to 5 U.S.C. § 551 *et seq*. not 5 U.S.C. § 701 *et seq*. No 17-00123, ECF No. 1, ¶ 4. Plaintiff in Case No. 18-00016 does not assert jurisdiction pursuant to 28 U.S.C. § 1331. *See* No. 18-00016, ECF No. 1, ¶ 9–11.

[2] Hereinafter, all citations to "E.R." are to the Federal Appellants' Excerpts of Record, ECF Nos. 46–47, cited by volume and then page number.

STATEMENT OF THE ISSUES[3]

1. Whether the district court erred when it found FWS did not fulfill its duties under the ESA because FWS failed to analyze the effect of the 2017 Final Rule designating and delisting the Greater Yellowstone Ecosystem grizzly bear distinct population segment on the lower-48 grizzly bear populations outside of the Greater Yellowstone Ecosystem area.

2. Whether the district court erred when it substituted its scientific judgment for that of FWS by finding FWS's determination in the 2017 Final Rule that it need not provide for natural connectivity or translocation to ensure the long-term genetic health of the species was contrary to the best available science.

STATEMENT REGARDING ADDENDUM

Pursuant to Circuit Rule 28-2.7, the pertinent statutory and regulatory provisions are reproduced in the addendum to this brief.

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[3] These issues are not the only issues raised in Ranchers' appeal, rather, these issues are those unique to Ranchers' Opening Brief. As further addressed in the Summary of the Argument, *infra*, Federal Appellants' and State Appellants' issues and arguments on appeal are herein adopted by reference, pursuant to Federal Rule of Appellate Procedure 28(i), including the recalibration issue framed and addressed by the State Appellants. *See Appellants State of Montana and Montana Department of Fish, Wildlife and Parks' Opening Brief* ("MT Op. Br."), ECF No. 56, at 1–2, 17–23; *Opening Brief of Appellant State of Wyoming* ("WY Op. Br."), ECF No. 59, at 4, 23–44; *Opening Brief for Appellant State of Idaho* ("ID Op. Br."), ECF No. 63, at 9–10, 19–29.

STATEMENT OF THE CASE

I. HISTORICAL BACKGROUND

The Endangered Species Act was enacted in 1973 to "provide a program for conservation of . . . endangered [] and threatened species." 16 U.S.C. § 1531(b). The ESA defines a "species" to include "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." *Id.* § 1532(16) (emphasis added). An "endangered species" is defined as "any species which is in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(6). A "threatened species" is one "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20).

The ESA was enacted with the intent to recover threatened or endangered species to a point where federal protections afforded by the ESA were no longer necessary. *Id.* §§ 1531(b), 1532(3). The ESA, *inter alia*, requires the Secretary of the Interior ("Secretary"), through FWS or the National Marine Fisheries Service ("NMFS") (collectively, "Services"), to periodically review all listed species to determine whether the species should be removed from the federal List of Endangered and Threatened Wildlife ("delisted"), changed in conservation status from an endangered to a threatened species ("downlisted"), or changed in conservation status from a threatened to an endangered species ("uplisted").

Id. § 1533(c)(2)(B). The Secretary is directed to make these determinations "solely on the basis of the best scientific and commercial data available." *Id.* § 1533(b)(1)(A). Once a species is successfully recovered, the species should be delisted and returned to state management.

In 1996, FWS and NMFS jointly adopted a policy to define the term "distinct population segment" and to guide their evaluation of whether a population group should be treated as a DPS ("DPS Policy"). 3 E.R. 437–40. The DPS Policy sets forth two factors for consideration: the "discreteness of the population segment in relation to the remainder of the species to which it belongs," and the "significance of the population segment to the species to which it belongs." 3 E.R. 440. The DPS Policy allows FWS and NMFS to focus their efforts as narrowly as possible, ensuring the Services can direct their limited resources to the greatest effect on the populations most in need of conservation efforts.

II. FACTUAL BACKGROUND

In 1975, FWS listed the grizzly bear in the lower-48 coterminous states as threatened under the ESA. 3 E.R. 441–43. At that time, the grizzly bear population in the GYE area was estimated to be as low as 136 bears. 2 E.R. 89. In 1982, FWS completed a Grizzly Bear Recovery Plan ("Recovery Plan"). 2 E.R. 89. Since the issuance of the Recovery Plan, FWS has focused on fostering recovery of six isolated ecosystems within the lower-48 states: (1) the GYE, (2) the Northern Continental

Divide Ecosystem ("NCDE"), (3) the Cabinet-Yaak area, (4) the Selkirk Mountains area, (5) the North Cascades area, and (6) the Bitterroot Ecosystem. 2 E.R. 90. In 1993, FWS amended the Recovery Plan to better address those individual recovery zones, stating "it was the intent of the FWS to delist individual populations *as they achieved recovery*." 2 E.R. 98 (emphasis added).

In 2007, FWS published a rule designating the GYE grizzly bear as a DPS and removing that DPS from the federal List of Endangered and Threatened Wildlife. 2 E.R. 86 Shortly thereafter, the 2007 Final Rule was challenged in the U.S. District Court for the District of Montana. *Greater Yellowstone Coal. v. Servheen*, 672 F. Supp. 2d 1105 (D. Mont. 2009). The district court, *inter alia*, granted summary judgment in favor of plaintiffs, finding two faults within the 2007 Final Rule: (1) the regulatory mechanisms were inadequate to ensure a healthy and adequate grizzly population post-delisting; and (2) FWS acted arbitrarily and capriciously when it failed to consider the threat posed to the GYE grizzly DPS by a decline in whitebark pine. *Id.* at 1126.

On appeal, this Court reversed the district court in regard to the adequacy of regulatory mechanisms, holding FWS reasonably concluded the regulatory framework, applicable on federal lands alone—which compromise 98% of the primary conservation area—were "sufficient to sustain a recovered Yellowstone grizzly bear population." *Greater Yellowstone Coal. v. Servheen*, 665 F.3d 1015,

1032 (9th Cir. 2011). This Court, however, upheld the vacatur and affirmed the district court's holding that FWS acted arbitrarily and capriciously because the 2007 Final Rule failed to evaluate the potential impact of the loss of whitebark pine on the grizzly bear by presenting no data indicating that whitebark pine declines would not threaten the GYE grizzly bear population. *Id.* at 1030. This Court still acknowledged that thanks to decades of "unprecedented efforts" by state, federal, and tribal land managers and scientists "the Yellowstone grizzly population has rebounded." *Id.* at 1019. In fact, by 2014, the GYE grizzly bear occupied 92% of the suitable habitat in the GYE. 2 E.R. 92, 206.

In December 2016, the Yellowstone Ecosystem Subcommittee released the *Conservation Strategy for the Grizzly Bear in the Greater Yellowstone Ecosystem* ("2016 Conservation Strategy"), which the Interagency Grizzly Bear Committee approved. 2 E.R. 96, 3 E.R. 217–349. The 2016 Conservation Strategy represents over 20 years of interagency and intergovernmental work that establishes objective, measurable habitat and population standards for the GYE grizzly bear population, and specifies clear state and federal management responses if deviations from these standards occur. 3 E.R. 217–349. The 2016 Conservation Strategy is designed to guide the continued management and monitoring of the GYE grizzly bear population and its habitat after delisting through the foreseeable future. 3 E.R. 217–349.

III. PROCEDURAL BACKGROUND

After years of additional study by FWS and independent experts, FWS determined that decreased availability of whitebark pine did not pose a substantial threat to the continued viability of the GYE grizzly bear population. 2 E.R. 117. FWS again moved forward with delisting, publishing its proposed rule in 2016. 2 E.R. 83. Following peer review and two rounds of public comment, FWS published the 2017 Final Rule on June 30, 2017 to designate the GYE grizzly bear population as a DPS and to delist the GYE DPS. 2 E.R. 127–28. The 2017 Final Rule was immediately challenged by environmentalist organizations, tribes, and individuals in the U.S. District Court for the District of Montana.[4] 1 E.R. 11.

Plaintiffs challenged the delisting decision under, *inter alia*, the ESA and Administrative Procedure Act ("APA") on two grounds relevant to this appeal: (1) FWS erred in designating and delisting the GYE grizzly bear DPS without further consideration of the impact that action would have on the other members of the lower-48 grizzly bear population; and (2) FWS acted arbitrarily and capriciously in its application of the five-factor threats analysis demanded by the ESA by failing to adequately justify the conclusion that neither mandatory translocation nor natural

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[4] Plaintiff in Case No. 18-00016 initially filed in the U.S. District Court for the Northern District of Illinois, which case was then transferred to the District of Montana and consolidated with the other five cases filed in that court. *See* 3 E.R. 476.

connectivity are necessary to ensure the long-term, genetic health of the GYE DPS. 1 E.R. 3. The district court granted summary judgment in favor of Plaintiffs on both grounds and vacated the 2017 Final Rule. 1 E.R. 4. This appeal followed.

SUMMARY OF ARGUMENT

In the interest of judicial efficiency, and pursuant to Federal Rule of Appellate Procedure 28(i), Ranchers do not repeat the issues and arguments raised by Defendant-Appellants United States of America; U.S. Department of the Interior; Ryan K. Zinke, Secretary, United States Department of the Interior; U.S. Fish and Wildlife Service; Jim Kurth, Acting Director, U.S. Fish and Wildlife Service; and Hilary Cooley, Grizzly Bear Recovery Coordinator (collectively, "Federal Appellants") or Intervenor-Defendant-Appellants State of Wyoming; State of Montana and Montana Department of Fish, Wildlife and Parks; and State of Idaho (collectively, "State Appellants") in their individual briefs, but instead incorporate those arguments as if fully set forth herein, unless otherwise specified. ECF Nos. 45, 56, 59, 63.[5]

[5] Ranchers do not incorporate the State of Wyoming's argument and analysis under Section II(A) urging deference to the agency's interpretation of the term "species" under the *Chevron* doctrine. WY Op. Br., ECF No. 59, at 45–50. Ranchers do not believe *Chevron* deference is appropriate in the case before the Court. Agency deference should be narrowly tailored to areas where agencies have expertise beyond that of the judiciary and not extended to the legal interpretation of statutory language.

Herein, Ranchers specifically focus on two issues not yet addressed before this Court:

1. The district court erred in requiring FWS to examine the effect of designating and delisting the GYE grizzly bear DPS on the "remnant population," for fear of leaving that population in legal limbo. Designating a DPS has no effect on the legal status of the "remnant population."[6] The district court's application of the *Humane Society* court's requirements to the underlying case ignores the factual disparity between the two cases, specifically the already uncertain listing status of the gray wolf populations in that case as opposed to the clear listing status of the lower-48 grizzly bear population here. Further, given that designating a DPS is, in actuality, identifying a separate and distinct "species" under the ESA, there is no statutory requirement that FWS examine the effect of delisting a DPS "species" on any other "species," including the "remnant population."

2. The district court impermissibly substituted its own scientific judgment in place of the agency's reasoned scientific conclusions. Although the district court

[6] The term "remnant population" does not appear in the ESA and was seemingly coined by the U.S. District Court for the District of Columbia in *Defenders of Wildlife v. Babbit*, 958 F.Supp. 670, 685 (D.D.C. 1997) to describe the listed population from which a DPS is drawn. As outlined below, however, once a DPS is created, two distinct and separate species are recognized under the ESA. Therefore, there is no "remnant population," instead, there are two distinct, legally recognized "species," the conservation status of which are not interdependent. The legal fiction created by the D.C. District Court should not be adopted by this Court.

was right to be skeptical of unfettered deference, one of the limited contexts in which agency deference is appropriate is when considering scientific and technical conclusions within the agency's particular expertise. This Court has long recognized this principle of heightened deference in the limited context of factual interpretation of scientific studies. Accordingly, the district court erred when it substituted its interpretation of scientific studies addressing the long-term genetic health of the GYE grizzly bear DPS for FWS's expert conclusion.

STANDARD OF REVIEW

The same standard of review applies to both issues raised by Ranchers in this brief.[7] A district court's decision to grant or partially grant summary judgment is reviewed *de novo*. *Greater Yellowstone Coal.*, 665 F.3d at 1023 (citing *Suever v. Connell*, 579 F.3d 1047, 1055 (9th Cir. 2009)). *De novo* review, in this context, requires the appellate court "'view 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) (quoting *Marathon Oil Co. v. United States*, 807 F.2d 759, 765 (9th Cir. 1986)).

"[R]eview of an agency's compliance with the ESA is governed by the [APA]." *Greater Yellowstone Coal.*, 665 F.3d at 1023 (citing *Native Ecosystems*

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[7] Federal Appellants and State Appellants have appropriately addressed the standards of review for the arguments set forth in their individual briefs, which arguments and standards Ranchers have incorporated herein.

Council v. Dombeck, 304 F.3d 886, 901 (9th Cir. 2002)). "Under the APA, we hold unlawful and set aside only those agency actions found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* (quoting 5 U.S.C. § 706(2)(A)). The arbitrary and capricious standard requires a court determine whether the agency based its decision "on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citations and quotations omitted).

Importantly, a reviewing court cannot substitute its judgment for that of the agency. *See Greater Yellowstone Coal.*, 665 F.3d at 1023 (citing *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) and *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43)); *see also National Ass'n of Home Builders v. Norton*, 340 F.3d 835, 841 (9th Cir. 2003); *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 953–54 (9th Cir. 2003); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003). A court should "be at its most deferential when the agency is making predictions, within its [area of] special expertise, at the frontiers of science." *Cent. Ariz. Water Conservation Dist. v. U.S. Envtl. Prot. Agency*, 990 F.2d 1531, 1540 (9th Cir. 1993) (citations and quotations omitted). This heightened deference is applicable under the ESA. *Trout Unlimited v. Lohn*, 559 F.3d 946, 956 (9th Cir. 2009).

The court may not "act as a panel of scientists that instructs the [agency] how to . . . choose[] among scientific studies." *The Lands Council v. McNair*, 537 F.3d 981, 988 (9th Cir. 2008), *overruled on other grounds by Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052, 1052 n.10 (9th Cir. 2009) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008)); *see San Luis & Delta–Mendota Water Auth. v. Locke*, 776 F.3d 971, 997 (9th Cir. 2014) ("[T]he agency has substantial discretion to choose between available scientific models, provided that it explains its choice.").

ARGUMENT

I. FWS IS NOT REQUIRED TO ANALYZE THE IMPACT OF DESIGNATING AND DELISTING A DISTINCT POPULATION SEGMENT ON THE "REMNANT POPULATION"

The district court properly reasoned that FWS has the authority to designate a DPS and delist that DPS in the same rule.[8] 1 E.R. 20–21. The error made by the district court, however, was in uncritically applying *Humane Society of the United States v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017), to find that FWS failed to conduct the necessary research or make the appropriate scientific findings to designate and delist the GYE grizzly bear DPS. 1 E.R. 22–31. The district court's error is two-

[8] Notably, Plaintiff-Appellees did not challenge this below. *See* 1 E.R. 20–21. Accordingly, Plaintiff-Appellees conceded the propriety of this aspect of the GYE grizzly bear designation.

fold: (1) designating a DPS has no effect on the legal status of the "remnant population"; and (2) FWS is not required to analyze any effect on the "remnant population" when delisting a DPS.

A. Designating a Distinct Population Segment Does Not Affect the Legal Status of the "Remnant Population"

The district court erred in reasoning that designating a DPS automatically places the "remnant population" in some sort of legal limbo that requires FWS to specifically examine and address the "remnant" when designating the DPS. In reality, that concern, raised in *Humane Society*, was due to the specific facts at issue with the gray wolf population in that case—facts not present with the GYE grizzly bear here.

The DPS Policy, promulgated in 1996, defines the statutory term "distinct population segment" and allows FWS to designate a subpopulation of a taxonomic or listed species as a DPS, so long as the subpopulation meets specific criteria. 3 E.R. 437–40. Once a DPS is designated, it is considered an independent "species" under the ESA. 16 U.S.C. § 1532(16) ("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.") (emphasis added). A properly designated DPS may then be listed or delisted, or have its conservation status downlisted or uplisted, just as any other "species" under the ESA. *Humane*

Soc'y, 865 F.3d at 600. In effect, FWS follows a two-step process: (1) designation of the DPS, then (2) alteration of the conservation status of the DPS "species."[9] While the *Humane Society* court, and the district court below, found that FWS can designate a DPS and then delist that DPS in the same rule, the process still consists of two distinct steps.

In *Humane Society*, the D.C. Circuit took issue with FWS's failure to address the effect of designating the Western Great Lakes gray wolf DPS on the remainder of the gray wolf population, which it termed the "remnant population." 865 F.3d at 589, 600–01. Specifically, the court took issue with step one of FWS's analysis—the designation of a DPS and thereby its "extraction" from the greater population. *Id.* at 600. The court found the fundamental error in FWS's decision to identify the gray wolves in the Western Great Lakes region as a DPS was that FWS "failed to address the impact that extraction of the segment would have on the legal status of the remaining wolves in the already-listed species. More specifically, [FWS] cannot find that a population segment is distinct . . . without determining whether the remnant itself remains a species so that its own status under the Act will continue as needed." *Id.*

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[9] Notably, FWS is not required to alter the conservation status of the designated DPS, and in fact, may only do so if the DPS satisfies the requirements set forth in the ESA.

The distinguishing issue before the *Humane Society* court was that the legal status of the "remnant population" was not uniform. As such, the D.C. Circuit questioned the status of the "remnant" after the designation of the Western Great Lakes gray wolf DPS. 865 F.3d at 602. The Western Great Lakes gray wolf designation did not simply extract a DPS from a single listed entity. *Id.* Instead, the DPS was created from the entirety of one previously listed "species"—the Minnesota gray wolf population—and a portion of another previously listed "species"—the lower-48 gray wolf populations outside Minnesota. *Id.* at 594, 602. Worse, those two "species" had different conservation statuses; the Minnesota population was listed as threatened, whereas the other lower-48 population was listed as endangered. *Id.* at 602. This factual confusion led to the D.C. Circuit's concern about the status of the "remnant population." The Court's concern was confirmed when FWS "announced that, with the Western Great Lakes segment carved out, the remnant is no longer a protectable 'species' and [] proposed its delisting for that reason alone." *Id.* (citation omitted). The crux of the D.C. Circuit's concern in *Humane Society* was that once the DPS was designated, the "leftover group [would] become[] an orphan to the law." *Id*. at 603. That is clearly not the case before this Court.

Here, the grizzly bear does not suffer from the same factual confusion. The lower-48 grizzly bear has been classified as belonging to six separate recovery

ecosystems since the late 1970s and has been officially treated as such since the 1980s. 2 E.R. 89–90. Moreover, FWS's stated goal since 1993 has been to recover the *separate* ecosystems and then delist them as *each* meets its recovery criteria. 2 E.R. 98.

There are not competing populations with different listing statuses in this case. The entirety of the lower-48 grizzly bear has been listed as an endangered species since 1975. 3 E.R. 441–43. Unlike the Western Great Lakes gray wolf, the GYE grizzly bear DPS is not being created from an amalgamation of separate listings under the ESA, but rather is simply being extracted from the lower-48 population as a whole. 2 E.R. 84. Accordingly, there can be no question that the "remnant," lower-48 population still qualifies as a species under the ESA—to believe otherwise would be to read all meaning out of the DPS Policy. In fact, unlike in *Humane Society*, here FWS expressly noted that the designation of the GYE grizzly bear DPS leaves the remnant, lower-48 population completely intact, without any change to its legal status. 2 E.R. 84 ("Identifying the GYE grizzly bear DPS and removing that DPS from the List of Endangered and Threatened Wildlife does not change the threatened status of the remaining grizzly bears in the lower-48, which remain protected by the [ESA].").

Nonetheless, even though the 2017 Final Rule sufficiently addressed the issue, after the D.C. Circuit's holding in *Humane Society*, FWS decided to reexamine the

Rule to determine whether it satisfied the D.C. Circuit's newly crafted requirements. *Endangered and Threatened Wildlife and Plants; Review of 2017 Final Rule, Greater Yellowstone Ecosystem Grizzly Bears*, 83 Fed. Reg. 18,737 (Apr. 30, 2018). Following FWS's analysis and public comment, FWS concluded that the 2017 Final Rule was sufficient because its "determination to designate the GYE population as a DPS and delist it, while deciding not to revisit the 1975 listing and leaving it in place for the remainder of the population, was consistent with the [ESA], with [FWS's] policies, and with the Department's longstanding legal interpretation." *Id*. at 18,737.

In sum, designating a DPS out of a single, already listed species allows FWS to "devote needed resources to the protection of endangered and threatened species, while abating the [ESA's] comprehensive protections when a species—defined to include a [DPS]—is recovered." *Humane Soc'y*, 865 F.3d at 598 (FWS's position in this regard is "consonant with the purposes" of the ESA). If designating a DPS altered the listing status or ability to list the "remnant," it would render the entire DPS policy useless—in direct contravention of congressional intent.

Accordingly, the district court erred in finding FWS must further address the legal status of the "remnant," lower-48 population when designating the GYE grizzly bear DPS.

B. FWS is Not Required to Examine the "Remnant Population" When Delisting a Distinct Population Segment

The ESA sets forth the appropriate considerations and requirements for altering the listing status of a "species"—consideration of the effect on a different "species" is not a statutory requirement. *See* 16 U.S.C. § 1533(a). The district court erred in finding FWS must examine the effect of delisting the GYE grizzly bear DPS, a legally recognized "species," on the "remnant" lower-48 grizzly bear, a separate, legally recognized "species" under the ESA.

After properly identifying a DPS, that segment is legally a separate entity from the rest of the taxonomic species, and is thus subject to its own, independent ESA processes when altering the DPS's conservation status. *See Alaska v. Lubchenco*, 723 F.3d 1043 (9th Cir. 2013) (a single listed species was later divided into two DPSs, each with a different conservation status).

In *Alaska v. Lubchenco*, this Court examined a challenge brought under the ESA regarding the status of a segment of the Steller sea lion. *Id*. at 1047. In 1990, NMFS listed the entire Steller sea lion population as "threatened." *Id.* at 1048. Seven years later, after additional research, NMFS published a rule dividing the population into an Eastern DPS and a Western DPS and then uplisting the Western DPS to "endangered" while maintaining the "threatened" listing status of the Eastern DPS. *Id.* at 1048–49. This Court, when analyzing plaintiffs' challenge to the uplisting of the Western DPS, examined sub-regions of that DPS—treating the

Western DPS as an independent "species" under the ESA. *Id.* at 1052. Specifically, this Court looked only to the Western DPS's Recovery Plan, a wholly distinct plan from that of the Eastern DPS, to analyze the appropriate ESA Section 4(a) factors. *Id.* The clear takeaway, under the ESA and this Court's precedent—a DPS is an independent "species."

While the D.C. Circuit correctly articulated the standard under which FWS must evaluate the status of a listed "species," that court failed to recognize that a DPS, for the purposes of the ESA, *is* the listed "species" in question. *See Humane Soc'y*, 865 F.3d at 601; *see also* 16 U.S.C. § 1532(16) (definition of species). The court noted that the ESA's "text requires [FWS], when reviewing and redetermining the status of a species, to look at the whole picture of the *listed species*, not just a segment of it." *Id.* (emphasis added). That "species," however, is the DPS, not the taxonomic species. As soon as the Western Great Lakes gray wolf population was designated a DPS, that DPS and the "remnant" gray wolf population became two separate and distinct "species" under the ESA. The *Humane Society* court, in requiring FWS to examine the effect of delisting the Western Great Lake gray wolf DPS on the "remnant population," confused the ESA's definition of "species" with the taxonomic species.

The D.C. Circuit further cites 16 U.S.C. § 1533(b)(1)(A) as "directing the Service, when revising the status of a species, to 'make [its] determinations . . . after

conducting a review of the status of *the species*' as listed." 865 F.3d at 601 (emphasis in original). Just as FWS would not be required to examine the effect of delisting the entirety of the lower-48 grizzly population on the grizzly bear population in Alaska, FWS need not examine the effect delisting the GYE DPS species may have on the "remnant population."

If FWS is required to examine the status of the "remnant" when attempting to change the listing status of a DPS, there would be no purpose in designating a DPS—why have the ability to create two entities if they are inextricably intertwined for every decision thereafter. Such treatment would require the "undifferentiated treatment of all members of a taxonomic species regardless of how their actual status and condition might change over time"—something the *Humane Society* court specifically warned against. *Id*. at 598. The D.C. Circuit's holding is not consistent with the language of the ESA or the DPS Policy. This judicially created fiction of the "remnant population" should not be adopted by this Court.

Accordingly, the district court erred in finding that FWS was required to examine the effect of delisting the GYE grizzly bear DPS on the "remnant population" of the lower-48 grizzly bear outside the GYE.

II. THE DISTRICT COURT ERRED IN SUBSTITUTING ITS JUDGMENT FOR THAT OF FWS WHEN THE COURT REINTERPRETED SCIENCE FWS RELIED ON TO SUPPORT ITS SCIENTIFIC CONCLUSIONS

While the district court was rightly wary of uncritically deferring to FWS's decision-making in the 2017 Final Rule, the court erred when it substituted its judgment for that of the agency in reinterpreting scientific studies supporting FWS's conclusions regarding the long-term genetic health of the GYE grizzly bear DPS.

Both the Supreme Court and this Court have long recognized the importance of deferring to an agency's scientific and technological judgment in areas of the agency's specific expertise. *See Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989) ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."); *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) ("When examining [an agency's] scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."); *see also Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012) ("Courts may not impose themselves as a panel of scientists that instructs the agency . . . , chooses among scientific studies . . . , and orders the agency to explain every possible scientific uncertainty.") (citations and quotations omitted) (alterations in original). "A court generally must be 'at its most deferential' when reviewing scientific

judgments and technical analyses within the agency's expertise . . . ." *Native Ecosystems Council*, 697 F.3d at 1051 (quoting *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir. 2011) and *Balt. Gas & Elec. Co.*, 462 U.S. at 103).

This Court's history is replete with cases deferring to an agency's interpretation of relevant scientific and technical information. In *Alaska Oil and Gas Association v. Pritzker*, this Court overturned the district court's decision to vacate a rule adding the Pacific bearded seal to the federal List of Endangered and Threatened Wildlife because the district court failed to defer to the agency's interpretation of the underlying science. 840 F.3d 671, 674 (9th Cir. 2016) ("The district court vacated the Listing Rule explaining that [the agency's] attempt to predict the bearded seal's viability beyond 50 years was 'too speculative and remote to support a determination that the bearded seal is in danger of becoming extinct.'") (citation omitted). This Court, however, corrected the district court's error and deferred to the agency's expertise, specifically noting that the agency "used six climate models to determine when the Beringia DPS's sea ice habitat would degrade to such an extent that it would render the Beringia DPS endangered, and it made available for public review its methodology and data." *Id.* at 677. Importantly, this Court recognized that the "ESA does not require [the agency] to make listing

decisions only if underlying research is ironclad and absolute." *Id.* at 680 (citing *San Luis & Delta–Mendota Water Auth.*, 747 F.3d at 602).

In *Alaska Oil and Gas Association v. Jewell*, this Court reversed the district court's decision to vacate the designation of certain critical habitat for the polar bear population in Alaska. 815 F.3d 544, 550 (9th Cir. 2016). This Court concluded that the district court impermissibly heightened the requirements FWS had to meet in order to designate critical habitat for the polar bear. *Id.* at 555. The ESA "requires use of the best available technology, not perfection." *Id.* (citations omitted). This Court reversed the lower court's vacatur based on this Court's deference to FWS's scientific research and interpretation of other experts' research on polar bear habitat. *Id.* at 556–62.

These cases are not outliers, but rather illustrate this Court's longstanding policy. *See Arizona ex rel. Darwin v. U.S. Envtl. Prot. Agency*, 852 F.3d 1148, 1157 (9th Cir. 2017) ("Courts must be particularly careful in reviewing questions involving 'a high level of technical expertise' because such matters are normally best left to the experience and judgment of the agency.") (citations and quotations omitted); *San Luis & Delta–Mendota*, 776 F.3d at 1007 ("We hold that the district court erred by failing to defer to the Agency's interpretation of a scientific study . . . . As long as the agency's decision is properly documented, as it is here, we will not overturn it.") (citation omitted); *Ranchers Cattlemen Action Legal Fund United Stockgrowers of*

Am. v. U.S. Dep't of Agric., 415 F.3d 1078 (9th Cir. 2005), *as amended* (Aug. 15, 2005) ("The district court failed to abide by this deferential standard. Instead, the district court committed legal error by failing to respect the agency's judgment and expertise. Rather than evaluating the Final Rule to determine if USDA had a basis for its conclusions, the district court repeatedly substituted its judgment for the agency's . . . ."); *Sw. Center for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998) ("Because there was a rational connection between the facts found in the [Biological Opinion] and the choice made to adopt the final [Reasonable and Prudent Alternative], and because we must defer to the special expertise of the FWS in drafting RPAs that will sufficiently protect endangered species, we cannot conclude that the Secretary violated the APA.").

In the rare instances when this Court refuses to defer to an agency, it does so because the agency has wholly failed to support its conclusion with *any* scientific evidence. *See Earth Island Institute v. Hogarth*, 494 F.3d 757, 763–64 (9th Cir. 2007) ("We conclude, however, that no deference to agency discretion as to methodology is appropriate when the agency ignores its own statistical methodology. In addition, because most of the data the government relied upon was inconclusive, the district court correctly held that the Final Finding was not rationally connected to the best available scientific evidence."); *Asarco, Inc. v. U.S. Envtl. Prot. Agency*, 616 F.2d 1153, 1162 (9th Cir. 1980) ("[T]he administrative

record at the time of the EPA's final decision does not disclose a reasoned scientific basis for concluding that significant amounts of particulates would form in the stack.").

Here, while Federal Appellants and State Appellants do an admirable job elucidating FWS's well-founded scientific conclusions, and demonstrating exactly how the agency's interpretation is superior to that of the district court, this Court need not get that far—the district court's error is visible from its methodology. In direct contravention of this Court's precedent, not only did the district court fail to defer to FWS's reasonable interpretation of the two scientific studies at issue, the district court delved into those studies to take its own turn at analyzing the science. 1 E.R. 40–48. The district court quite literally acted "as a panel of scientists" and proceeded as if it had the expertise necessary to interpret scientific studies addressing the long-term genetic viability of the GYE grizzly bear DPS. 1 E.R. 40–48; *see Native Ecosystems Council*, 697 F.3d at 1051.

Even if the studies the district court questioned are not "ironclad and absolute," the district court was still obligated to defer to FWS's interpretation of those studies to support its finding that genetic diversity does not currently pose a risk to the long-term health of the GYE grizzly bear DPS. *See Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d at 680. FWS made its findings known to the public before adopting the 2017 Final Rule. 1 E.R. 9; 2 E.R. 83–214; *see Alaska Oil & Gas Ass'n*

v. Pritzker, 840 F.3d at 677. FWS also considered two rounds of public comment regarding the GYE grizzly bear DPS. 1 E.R. 9; 2 E.R. 83–214.

Accordingly, the district court erred in substituting its judgment for that of FWS and finding FWS acted arbitrarily and capriciously when the agency concluded that neither natural connectivity nor translocation were immediately necessary to the long-term, genetic health of the GYE grizzly bear DPS. This Court should not allow the district court's overreach to stand.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's judgment and uphold the 2017 Final Rule.

DATED this 21st day of June 2019.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The following, pending cases are related to this appeal within the meaning of Circuit Rule 28-2.6(a), (c), and (d), because they arise out of the same, consolidated cases in the district court, raise the same or closely related issues, and involve the same transaction or event:

1. *Crow Indian Tribe, et al. v. Wyoming*, Case No. 18-36030 (9th Cir.);
2. *Crow Indian Tribe, et al. v. Safari Club International, National Rifle Association of America, Inc.*, Case No. 18-36038 (9th Cir.);
3. *Crow Indian Tribe, et al. v. Sportsmen's Alliance Foundation, Rocky Mountain Elk Foundation*, Case No. 18-36042 (9th Cir.);
4. *Crow Indian Tribe, et al.; and Robert H. Aland v. United States of America, et al.; and Wyoming, Safari Club International, National Rifle Association of America, Inc., Sportsmen's Alliance Foundation, Rocky Mountain Elk Foundation, Idaho*, Case No. 18-36050 (9th Cir.);
5. *Crow Indian Tribe, et al. v. Idaho*, Case No. 18-36077 (9th Cir.); and
6. *Crow Indian Tribe, et al. v. Montana, Montana Department of Fish, Wildlife and Parks*, Case No. 18-36080 (9th Cir.)

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I am the attorney or self-represented party.

This brief contains 6,898 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2019, I electronically filed the foregoing *Intervenor-Defendant-Appellants Wyoming Farm Bureau Federation; Wyoming Stock Growers Association; Charles C. Price; and W&M Thoman Ranches, LLC's Opening Brief* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit via the appellate CM/ECF system, which will serve all registered CM/ECF users.

Additionally, I further certify that on June 21, 2019, I served an identical copy of the foregoing brief by first class U.S. mail to the following, unregistered case participant:

Robert H. Aland
140 Old Green Bay Road
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/s/ Cody J. Wisniewski
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MOUNTAIN STATES
LEGAL FOUNDATION

Attorney for Intervenor-Defendant-Appellants

ADDENDUM

Endangered Species Act, 16 U.S.C. § 1531(b) ……….……………………………2A

Endangered Species Act, 16 U.S.C. § 1532(3), (6), (16) and (20) ……….…… 3A

Endangered Species Act, 16 U.S.C. § 1533(a) ………………………………….5A

Endangered Species Act, 16 U.S.C. § 1533(b)(1)(A) ……………….…………7A

Endangered Species Act, 16 U.S.C. § 1533(c)(2)(B) …………………………...8A

83 Fed. Reg. 18,737 ……………………………………………………………..9A

16 U.S.C 1531

Congressional findings and declaration of purposes and policy

. . .

(b) Purposes

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

16 U.S.C 1532

Definitions

. . .

(3) The terms “conserve”, “conserving”, and “conservation” mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

. . .

(6) The term "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this Act would present an overwhelming and overriding risk to man.

. . .

(16) 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.

. . .

(20) The term "threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

16 U.S.C 1533

Determination of endangered species and threatened species

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

(2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce pursuant to Reorganization Plan Numbered 4 of 1970--

(A) in any case in which the Secretary of Commerce determines that such species should--

(i) be listed as an endangered species or a threatened species, or

(ii) be changed in status from a threatened species to an endangered species, he shall so inform the Secretary of the Interior, who shall list such species in accordance with this section;

(B) in any case in which the Secretary of Commerce determines that such species should--

(i) be removed from any list published pursuant to subsection (c) of this section, or

(ii) be changed in status from an endangered species to a threatened species, he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and

(C) the Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) and to the maximum extent prudent and determinable--

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

(B)(i) The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 670a of this title, if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

(ii) Nothing in this paragraph affects the requirement to consult under section 1536(a)(2) of this title with respect to an agency action (as that term is defined in that section).

(iii) Nothing in this paragraph affects the obligation of the Department of Defense to comply with section 1538 of this title, including the prohibition preventing extinction and taking of endangered species and threatened species.

. . .

(b) Basis for determinations

(1)(A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account 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.

. . .

(c) Lists

. . .

(2) The Secretary shall--

. . .

(B) determine on the basis of such review whether any such species should--

(i) be removed from such list;

(ii) be changed in status from an endangered species to a threatened species; or

(iii) be changed in status from a threatened species to an endangered species.

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R6–ES–2017–0089; FXES11130900000C6–178–FF09E42000]

Endangered and Threatened Wildlife and Plants; Review of 2017 Final Rule, Greater Yellowstone Ecosystem Grizzly Bears

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Regulatory review; determination.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce our determination that our 2017 final rule to designate the population of grizzly bears in the Greater Yellowstone Ecosystem (GYE) as a distinct population segment and remove that population from the Endangered Species Act's List of Endangered and Threatened Wildlife does not require modification. After considering the best scientific and commercial data available and public comments on this issue received during a regulatory review, we affirm our decision that the GYE population of grizzly bears is recovered and should remain delisted under the Act. Accordingly, the Service does not plan to initiate further regulatory action for the GYE grizzly bear population.

DATES: This determination is made April 30, 2018.

ADDRESSES: Supplementary documents to this determination, including public comments received, can be viewed online at *http://www.regulations.gov* in Docket No. FWS–R6–ES–2017–0089.

FOR FURTHER INFORMATION CONTACT: Hilary Cooley, Grizzly Bear Recovery Coordinator, U.S. Fish and Wildlife Service, University Hall, Room 309, Missoula, MT 59812; by telephone (406) 243–4903. Persons who use a telecommunications device for the deaf may call the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: We, the U.S. Fish and Wildlife Service (Service), are issuing this document as a followup to a prior **Federal Register** document regarding Greater Yellowstone Ecosystem (GYE) grizzly bears published on December 7, 2017 (82 FR 57698). In that **Federal Register** document, we asked for public comments on the impact of a court ruling on our final rule (82 FR 30502, June 30, 2017) designating the GYE population of grizzly bears as a distinct population segment (DPS) and removing that population from the protections of the Endangered Species Act (Act; 16 U.S.C. 1531 *et seq.*). Hereafter referred to as the ''Final Rule,'' the June 2017 rule removed the GYE population of grizzly bears from the List of Endangered and Threatened Wildlife (List) in title 50 of the Code of Federal Regulations (50 CFR 17.11(h)).

The referenced court opinion from the United States Circuit Court of Appeals for the D.C. Circuit, *Humane Society of the U.S.* v. *Zinke,* 865 F.3d 585 (D.C. Cir. 2017), addressed the analysis undertaken to designate a DPS from a previously listed entity and remove that DPS from the List (*i.e.,* ''delist'' it). We believe that the 2017 decision to remove the GYE population of grizzly bears from the List complies with the Act, but we decided to consider issues relating to the remainder of the grizzly bear population in the lower 48 States in light of the *Humane Society* opinion. After considering the best scientific and commercial data available regarding the grizzly bear population in the lower 48 States, the species' historical range, and public comments received, the Service has determined that the Final Rule delisting the GYE DPS does not require modification and that the remainder of the population will remain protected under the Act as a threatened species unless we take further regulatory action. We affirm our decision that the GYE population of grizzly bears is recovered and should remain delisted under the Act.

Background

In 1975, the Service listed the grizzly bear (*Ursus arctos horribilis*) in the lower 48 United States as a threatened species under the Act (40 FR 31734, July 28, 1975). In designating the GYE population of grizzly bears as a DPS in 2017 and removing the population from the List, the Service did not reopen the 1975 listing rule through the Final Rule. Rather, the Service identified the GYE grizzly bears as a DPS, concluded that the GYE population was stable, threats were sufficiently ameliorated, and a post-delisting monitoring and management framework had been developed and incorporated into regulatory mechanisms or other operative documents. The best scientific and commercial data available, including our detailed evaluation of information related to the population's trend and structure, indicated that the GYE grizzly bear DPS had recovered and threats had been reduced such that it no longer met the definition of a threatened or endangered species under the Act. The Final Rule became effective on July 31, 2017, and remains in effect, as does the 1975 listing that applies to the lower 48 States population except for the GYE DPS.

On August 1, 2017, the Court of Appeals for the District of Columbia Circuit issued a ruling, *Humane Society of the United States, et al.* v. *Zinke,* 865 F.3d 585 (D.C. Cir. 2017), that affirmed in part the prior judgment of the district court vacating the 2011 delisting rule (76 FR 81666, December 28, 2011) for wolves in the Western Great Lakes (WGL). The 2011 rule designated the gray wolf population in Minnesota, Wisconsin, and Michigan, as well as portions of six surrounding States, as the WGL DPS, determined that the WGL DPS was recovered, and delisted the WGL as a DPS. The D.C. Circuit ruled that, while the Service had the authority to designate a DPS and delist it in the same rule, the Service violated the Act by designating and delisting the WGL wolf DPS without evaluating the implications for the remainder of the listed entity of wolves after delisting the DPS. The court also ruled that the Service failed to analyze the effect of lost historical range on the WGL wolf DPS. In light of this ruling, we asked for public input to aid our consideration of whether the GYE delisting determination should be revisited and what, if any, further analysis was necessary regarding the remaining grizzly bear populations and lost historical range.

Regulatory Approach in the Final Rule

The Service's determination to designate the GYE population as a DPS and delist it, while deciding not to revisit the 1975 listing and leaving it in place for the remainder of the population, was consistent with the Act, with Service policies, and with the Department's longstanding legal interpretation. In section 4(a) of the Act, the Service is authorized to identify and evaluate ''any species.'' (16 U.S.C. 1533(a)(1)). This includes any DPS of any species of vertebrate fish or wildlife. (16 U.S.C. 1532(16)). The Service determines a species' status, *i.e.,* whether it is threatened or endangered, after considering the five factors listed in section 4(a)(1) of the Act. (16 U.S.C. 1533(a)(1)(A)–(E)). The Act imposes a mandatory duty on the Secretary to notify the public of these determinations by maintaining a list. Specifically, section 4(c)(1) of the Act requires the Secretary to ''publish in the **Federal Register** a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species.'' (16 U.S.C.

1533(c)(1)). The Act requires the Secretary, ''from time to time,'' to revise the lists ''to reflect recent determinations, designations, and revisions. . . .'' (16 U.S.C. 1533(c)(1)).

This framework is addressed in detail in a Memorandum Opinion from the Department of the Interior's Office of the Solicitor (M–37018, U.S. Fish and Wildlife Service Authority under Section 4(c)(1) of the Endangered Species Act to Revise Lists of Endangered and Threatened Species to ''Reflect Recent Determinations,'' December 12, 2008 (M-Opinion)). The M-Opinion explained that, when the Service lists an entire species, the Service may be effectively listing several smaller separately listable entities because, as set forth in Service regulations, listing a particular taxon includes all lower taxonomic units. (M-Opinion, p. 7; *see also* 50 CFR 17.11(g)). The M-Opinion states that ''when identifying and removing a DPS from a broader species listing, . . . [the Service] is separately recognizing an already-listed entity for the first time because it now has a different conservation status than the whole.'' *Id.* As explained above, once that DPS is identified as being separate from the listed whole, the Act requires the Service to update the List. *Id.* at p. 3. The *Humane Society* court considered the M-Opinion and upheld the Solicitor's interpretation of the Act: ''We hold that the Service permissibly concluded that the Endangered Species Act allows the identification of a distinct population segment within an already-listed species, and further allows the assignment of a different conservation status to that segment if the statutory criteria for uplisting, downlisting, or delisting are met.'' *Humane Society,* 865 F.3d at 600.

Some commenters on the December 7, 2017, **Federal Register** document argued that section 4(c)'s requirements to maintain the lists of endangered and threatened species, and to review those lists periodically, prohibit the Service from focusing a regulatory action on a DPS (one part of a broader entity). We reject this view as inconsistent with the Act. As explained above, and in the referenced M-Opinion, section 4(c)(1) of the Act imposes a mandatory duty on the Secretary of the Interior to publish and maintain the lists of all of the species that either the Secretary of the Interior or the Secretary of Commerce has determined to be endangered species or threatened species under section 4(a)(1). The regulations (50 CFR 17.11(a)) contemplate that a single taxonomic species, or components thereof, can be the subject of multiple listing actions under section 4(a)(1) and, therefore, can have more than one entry on the lists. Thus, section 4(c)(1), consistent with section 4(a)(1) and 50 CFR 17.11(a), allows the Secretary of the Interior, through the Service, to document the legal effect of multiple listing entries for a taxonomic species, for instance by including multiple entries for a taxonomic species or by revising a list to reflect that a recent determination superseded all or part of a previous listing action.

Nothing in section 4(c)(2) is to the contrary. It requires the ''Secretary'' to periodically review the species on the List. Thus, at least every 5 years, the lists must be reviewed to determine if a species over which the Secretary has authority should be removed, downlisted from endangered to threatened, or uplisted from threatened to endangered. (16 U.S.C. 1533(c)(2)). This requirement incorporates the listing determination provisions at sections 4(a) and 4(b), and is separate from the requirement to revise the lists in section 4(c)(1). The requirement in section 4(c)(2) that both Secretaries review the species on the lists at least once every 5 years does not limit or add to the section 4(c)(1) requirement for the Secretary of the Interior to revise the lists to reflect recent determinations made by either Secretary. Nothing in the Act requires the Service to undertake a 5-year review of a listed species contemporaneously with taking an action on a lower taxonomic unit within the species. Simply put, sections 4(a)(1) and 4(c)(2) of the Act respectively require both Secretaries to make and periodically review listing determinations with respect to species, subspecies, and DPSs, while section 4(c)(1) creates a separate and independent regulatory obligation for the Secretary of the Interior to revise the lists to reflect listing determinations.

Targeted rulemaking on a DPS, without also reopening prior listing rules or expanding our inquiry to other species, furthers the purposes and objectives of the Act. The approach allows the Service the flexibility to either uplist or downlist a DPS of an already-listed entity without diverting agency resources to determining the overall status of the broader entity. In addition, targeted rulemaking furthers Congress's intent to focus the Act's protections and Service resources on those species that truly qualify as threatened or endangered or that require another change in regulatory status. Focusing on recovered DPSs serves other policy objectives. The principal goal of the Act is to return listed species to a point at which protection under the Act is no longer required. Once a species is recovered, its management should be returned to the States. Our approach furthers that objective. It also creates incentives for Federal–State cooperative efforts to achieve recovery. This approach also avoids needless expenditure of scarce Federal funds on populations that are no longer threatened or endangered.

Following the framework in section 4 of the Act, the Service can determine the status of a DPS consistent with the Service's DPS policy. (61 FR 4722 (February 7, 1996)). We can proceed in different ways when addressing a DPS. For example, we can revisit the listing of a taxonomic species and designate multiple DPSs of that species or we can keep the listing of the taxonomic species in place and reclassify one or more of its DPSs. The latter course is permissible, as a DPS designation identifies a population *within* a taxonomic species or subspecies. (16 U.S.C. 1532(16); defining a DPS as a ''segment of'' a species). Under the Act, designating a DPS does not automatically split or carve up a taxonomic entity, but merely recognizes that a DPS is a population within a taxonomic entity. Thus, focused regulatory action on listing or delisting a DPS is appropriate under the Act and consistent with the Act's purposes of providing the Service with discretion to order priorities and take regulatory action that best serves the policies and purposes of the Act.

In the GYE DPS rulemaking action, the Service designated a valid species, the GYE DPS, that is a segment of the 1975 listed entity, and then applied the five factors to the DPS. The Service determined that the species did not qualify as threatened or endangered. Once the determination regarding the GYE grizzly bear DPS was made, the Secretary had made a decision for purposes of the listing requirements in section 4(c) and he was *required* to modify the list to reflect his new determination. There is no corresponding requirement to modify the original listed entity or to separately assess its status.

By taking regulatory action on the DPS itself and not revisiting the 1975 rulemaking, we did not reopen the lower-48-States listing, which does not now include the GYE DPS. All of the grizzly bears in the lower 48 States remain listed as threatened, except where superseded by the GYE DPS delisting. (82 FR 30503, 30546, 30552, 30623, 30624, 30628, June 30, 2017). We concluded that ''it is not an efficient use of our limited resources to initiate a rulemaking process to revise the lower-

48-States listing. Such a rulemaking would provide no more information about our intentions for grizzly bear recovery than the parameters and documents already guiding our existing grizzly bear recovery program.'' (82 FR 30623, June 30, 2017).

The regulatory action in the Final Rule is consistent with our recovery strategy for all grizzly bears in the coterminous lower 48 States. The Final Rule discusses the recovery strategy for lower-48-States grizzly bears, including the Recovery Plan, which provided management goals for six different grizzly bear populations identified by ecosystems. The Recovery Plan identifies unique demographic recovery criteria for each ecosystem population, and states that it is the Service's goal to delist individual populations as they recover. Thus, the Service's action in delisting the GYE DPS is consistent with the Recovery Plan. The GYE population is the first of the six populations to recover. We note, however, that the population in the Northern Continental Divide Ecosystem may be eligible for delisting in the near future. The Service's data indicates that this population has likely met recovery goals. Other populations may be uplisted, downlisted, or delisted based on their overall health and numbers.

In summary, the Service has appropriately considered the impact of the GYE delisting on the lower-48-States population of grizzly bears. The Final Rule properly implemented the recovery strategy by employing discrete rulemaking with respect to the GYE population of grizzly bears. The Service has the discretion under the Act to engage in targeted rulemaking for a DPS—a species as defined under the Act—and to determine its status based on the five factors set forth in section 4(a)(1). While the Service must revise its lists of endangered and threatened species from time to time to reflect new determinations, section 4(c)(2) imposes no corollary obligation to revisit past rules affecting that species at the same time. The Service can designate a DPS from a prior listing and take action on that DPS without reopening the prior listing. Therefore, we disagree with *Humane Society* to the extent it can be read to impose an obligation with respect to the broader listing when designating a DPS from that listing. However, as explained below, we decided to further consider the impact of the GYE DPS delisting on the lower-48-States grizzly bear population and whether further regulatory action is required for the GYE DPS delisting.

Response to Comments

The Service received more than 3,600 comments on the adequacy of the Final Rule in light of *Humane Society.* A number of comments were outside the scope of our request for public comments. Responsive comments ranged from contentions that the Final Rule is adequate in light of *Humane Society* and further evaluation is not needed to assertions that *Humane Society* renders the Final Rule invalid. Issues and new information raised during the public comment period were incorporated into the analysis presented in this document and were analyzed in more detail in a supporting document. For detailed summaries of and responses to public comments, see the Supporting Documents in Docket No. FWS–R6–ES–2017–0089 at *http://www.regulations.gov.*

Assessment

Commenters responding to the December 7, 2017, **Federal Register** document expressed concern about the protections and status of grizzly bears located outside of the GYE DPS boundaries. We did address these concerns in our Final Rule, explaining that grizzly bears outside the DPS boundaries remain fully protected as a threatened species under the Act, that our recovery strategy will continue to focus on ecosystem-wide recovery zones, and that the DPS delisting does not affect the status or likely recovery of other grizzly bear recovery zone populations (through connectivity, exchange, etc.). However, in view of the *Humane Society* decision and the public comments received, we address these issues in greater detail below, including the status of the GYE DPS, the status of the lower-48-States entity, the impact of the GYE delisting on the lower-48-States entity, the impact of the lower-48-States entity on the GYE DPS, and the impact of lost historical range.

Status of the GYE DPS

In our Final Rule, we found that the GYE grizzly bear population is discrete from other grizzly bear populations and significant to the remainder of the taxon (*i.e., Ursus arctos horribilis*). Therefore, it is a listable entity under the Act and under our DPS Policy (61 FR 4722, February 7, 1996). The Service concluded that the GYE grizzly bear population has recovered to the point at which protection under the Act is no longer required. The best scientific and commercial data available indicate that the GYE grizzly bear DPS is not endangered or threatened throughout all or a significant portion of its range. We are aware of no information that would warrant revisiting this determination.

Status of the Lower-48-States Entity

The 1975 final rule listed grizzly bears in the lower 48 States as threatened (40 FR 31734, July 28, 1975). In the Final Rule, we noted that the grizzly bears occurring outside of the boundary of the GYE DPS in the lower 48 States remain threatened and therefore protected by the Act (82 FR 30503, 30546, 30552, 30623, 30624, 30628, June 30, 2017). The Service has the discretion to revisit this determination at a later time, although it is not required now as explained above, and we may do so as we consider other populations within the lower-48-States entity.

Impact of GYE Delisting on the Lower-48-States Entity

As explained above, the Final Rule did not reopen the 1975 listing rule, although it no longer covers the GYE DPS. The 1975 listing remains valid. Although the ESA does not require an analysis of the Final Rule's impact on the 1975 listing, we conduct that analysis here in response to public comments. It is possible that delisting a DPS of an already-listed species could have negative effects on the status of the remaining species. For example, removing the Act's protections from one population could impede recovery of other still-listed populations (82 FR 30556–30557, June 30, 2017). For grizzly bear, delisting the GYE DPS could have implications for the remaining populations that have not yet achieved recovery. One possible implication could be that delisted grizzly bears inside the GYE DPS may be subject to increased mortality, which could reduce grizzly bear dispersal into other recovery zones. A map of grizzly bear recovery areas is available at *https://www.fws.gov/mountain-prairie/es/species/mammals/grizzly/GBdistributions.jpg.* While natural connectivity between recovery zones is not a recovery criterion for any of the recovery zones, it is one of our long-term objectives (USFWS 1993, p. 24, entire) as it would likely speed the achievement of recovery goals and increase genetic variability, and any increase in mortality inside the GYE DPS could limit such benefits.

The Bitterroot Ecosystem (BE) could be impacted most by changes in dispersal from the GYE DPS because it is within potential dispersal distance (120 km (75mi)) from the GYE DPS (Blanchard and Knight 1991, pp. 54–55; Proctor et al. 2004, p. 1113), as well as the Northern Continental Divide Ecosystem (NCDE) (35 km (21 mi);

Costello 2018, *in litt.*). Although the BE is unoccupied and isolated from other populations, there is a potential that dispersal from the GYE DPS could lead to the development of a grizzly population in the BE. Federal and State management agencies that make up the Interagency Grizzly Bear Study Team accounted for potential connectivity to the BE by extending a portion of the Demographic Monitoring Area (DMA) boundary to the western edge of the GYE DPS boundary to include suitable grizzly bear habitat in the Centennial Mountains (82 FR 30504, June 30, 2017). The Centennial Mountains lie inside both the GYE DPS and DMA and provide an east-west corridor of suitable habitat from the GYE to the BE ecosystem. The extended DMA is still a significant distance from the BE, but the mortality limits are in effect inside the DMA, ensuring that mortalities will be limited in this area of potential connectivity between the two ecosystems if dispersal were to occur. However, despite protections of the Act, we have no evidence of grizzly bears successfully dispersing from the GYE into the BE. Therefore, we conclude that any effect on dispersal in this area due to the Final Rule would likely be minimal. It is more likely that the BE will be recolonized by the NCDE population, as the distance between the two ecosystems is shorter and there is more suitable habitat in the interstitial area.

Connectivity between the GYE DPS and the NCDE has the greatest potential due to proximity (110 km (68 mi)) of currently occupied range in both ecosystems (Peck *et al.* 2017, p. 2). The Tobacco Root mountain range may be a particularly important dispersal pathway between these two ecosystems (Peck *et al.* 2017, p. 15). The Tobacco Roots fall in the northwest corner of the GYE DPS, outside the DMA and associated mortality limits. Delisting of the GYE population may reduce the potential for GYE grizzly bears to disperse through the Tobacco Roots (or other pathways) to the NCDE, or for NCDE grizzly bears to disperse into the GYE due to potential increased mortality inside the GYE DPS. However, genetic isolation is not a concern for the NCDE or the GYE. Due to its relatively large population size, high level of heterozygosity, and continued connection with Canada, the NCDE does not need immigrants from the GYE to reach recovery (Kendall *et al.* 2009, pp. 8, 12; Costello *et al.* 2016, p. 2). To date, we have no evidence of grizzly bears successfully dispersing from the GYE into the NCDE or any other recovery zone, despite protections of the Act. Genetic analysis confirms that the GYE DPS remains isolated, with no evidence of recent immigrants from other populations (Haroldson *et al.* 2010, p. 8; Proctor *et al.* 2012, pp. 16–17). Furthermore, no recent observations of grizzly bears in the Tobacco Roots have been confirmed either through non-invasive surveys (Lukins *et al.* 2004, p. 171) or surveillance of observation reports (K. Frey 2017, *pers. comm.*).

The Selkirk Ecosystem and Cabinet-Yaak Ecosystem are currently occupied and connected to grizzly bear populations in Canada. They, along with the North Cascades Ecosystem, are also beyond any known expected dispersal distance from the GYE. Therefore, any potential increased mortality in the GYE would not impact these populations.

Mortality limits for independent females and males and dependent young in the GYE DMA, adopted into regulation by each State, are in place and will reduce potential for impacts to dispersal. Regulatory mechanisms are in place and adequately address threats in a manner necessary to maintain a recovered population into the foreseeable future (82 FR 30528–30535, June 30, 2017). The mortality limits were calculated as those needed to maintain the population at a stable level, and take into account all sources (human-caused, natural, unknown) of mortality. They are calculated as annual mortality rates on a sliding scale depending on the annual population size estimate. Idaho, Montana, and Wyoming have committed to these mortality limits in the 2016 Conservation Strategy (YES 2016) and in a Memorandum of Agreement (MOA; Wyoming Game and Fish Commission *et al.* 2016, entire) and are set forth in State regulations. The agreed-upon mortality limits will maintain the population within the DMA around the long-term average population size for 2002–2014 of 674 grizzly bears, consistent with the revised demographic recovery criteria (USFWS 2017, entire) and the MOA (Wyoming Game and Fish Commission *et al.* 2016, entire). Montana's State management plan includes a long-term goal of allowing grizzly bear populations in southwestern and western Montana to reconnect through the maintenance of non-conflict grizzly bears in areas between the ecosystems. The State of Montana has indicated that, while discretionary mortality may occur, the State will manage discretionary mortality to retain the opportunity for natural movements of grizzly bears between ecosystems (MFWP 2013, p. 9; 82 FR 30556, June 30, 2017).

Mortality limits do not exist for areas outside the DMA within the GYE DPS; however, we do not expect grizzly bears to establish self-sustaining populations there due to a lack of suitable habitat, land ownership patterns, and the lack of traditional, natural grizzly bear foods. Instead, grizzly bears in these peripheral areas will likely always rely on the GYE grizzly bear population inside the DMA as a source population (82 FR 30510–30511, June 30, 2017). The current distribution of grizzly bears within the GYE DPS includes areas outside of the DMA, and, as such, grizzly bears in these areas may be exposed to higher mortality. However, grizzly bears throughout the GYE DPS are classified as a game species by all three affected States and the Eastern Shoshone and Northern Arapaho Tribes of the Wind River Reservation, and, as such, cannot be taken without authorization by State or Tribal wildlife agencies (82 FR 30530, June 30, 2017; W.S. 23–1–101(a)(xii)(A); W.S. 23–3–102(a); MCA 87–2–101(4); MCA 87–1–301; MCA 87–1–304; MCA 87–5–302; IC 36–2–1; IDAPA 13.01.06.100.01(e); IC 36–1101(a); Idaho's Yellowstone Grizzly Bear Delisting Advisory Team 2002, pp. 18–21; MFWP 2013, p. 6; Eastern Shoshone and Northern Arapahoe Tribes 2009, p. 9; WGFD 2016, p. 9; YES 2016a, pp. 104–116).

The primary potential impact of delisting the GYE DPS on the status of the listed species is the potential to limit dispersal from the GYE into other unrecovered ecosystems due to increased mortality within the DPS. However, we do not expect mortalities to increase significantly because the vast majority of suitable habitat inside the GYE DPS is within the DMA where bears are subject to mortality limits. Grizzly bears remain protected by the Act outside the DPS. Additionally, food storage orders on public lands provide measures to limit mortality and promote natural connectivity through a reduction in conflict situations. (82 FR 30536, 30580, June 30, 2017). Despite these protections, successful dispersal events remain rare and play a very minor role in population dynamics because of the large amounts of unsuitable habitat between ecosystems. The probability of successful dispersal is low despite recent expansion of the GYE and NCDE populations (Peck *et al.* 2017, p. 15); accordingly, we have no recent evidence of successful dispersal from the GYE into any other ecosystem. However, populations in both ecosystems are currently expanding into new areas, and the GYE is expanding beyond the DMA.

If populations continue to expand, decreasing the distance between populations, the likelihood of successful immigration will increase (Peck *et al.* 2017, p. 15). In short, we find that impacts of delisting the GYE DPS on the lower-48-States entity are minimal, do not significantly impact the lower-48-States entity, and do not affect the recovery of the GYE grizzly bears. This analysis does not warrant any revision or amendment of the Final Rule.

Finally, we believe there is sufficient evidence that the currently listed species (grizzly bears in the lower 48 States) contains more than one DPS. For example, preliminary data indicates the NCDE population is a DPS; the Service intends to evaluate that population to determine if it qualifies for DPS designation and, if so, consider its status. The Act's protections will continue outside the DPS boundaries until subsequent regulatory action is taken on the 1975 listing rule or specific DPSs within the boundaries of the entity listed in 1975. We believe this is the most precautionary and protective approach to grizzly bear recovery.

Impact of the Lower-48-States Entity on the GYE DPS

The lower-48-States entity that remains listed may have implications for the delisted GYE DPS. Throughout the range of the grizzly bear in the lower 48 States, human-caused mortality is limited and habitat is managed to promote recovery, which may increase the potential for the remaining grizzly bear population to act as a source population for the delisted GYE DPS. The lower 48 States contain several populations that are increasing in number and distribution, and may, at some point, provide dispersers into the GYE DPS. Although connectivity is not necessary for the current genetic health of the GYE grizzly bear population, it would deliver several benefits to the GYE, including increases in genetic diversity and increased long-term viability of the population (82 FR 30535–30536, 30544, 30581, 30610–30611, June 30, 2017). However, while successful dispersal is possible, the likelihood is low due to large areas of unsuitable habitat between populations. 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). The States have committed to a variety of measures to maintain genetic diversity. Wyoming has acknowledged that translocation of bears may take place in the future if necessary (WGFD 2016, p. 13). As described above, Montana has committed to managing discretionary mortality to retain the opportunity for grizzly bears to migrate between ecosystems. (MFWP 2013, p. 9; 82 FR 30556, June 30, 2017). Therefore, while the protected status of the lower-48-States grizzly bear population theoretically could engender several beneficial effects on the GYE DPS, those benefits will likely be minimal in the near term.

Impact of Lost Historical Range

When reviewing the current status of a species, we can also evaluate the effects of lost historical range on the species. As noted above, the Final Rule did not revisit the 1975 rule or perform a status review of grizzly bears in the lower 48 States. Therefore, the Final Rule was not required to assess the loss of historical range on the lower-48-States entity. However, in response to public comments suggesting that a historical range analysis for the lower-48-States population is required, we elaborate on the analysis of historical range and the status of the lower-48-States entity as previously addressed in the Final Rule.

Ursus arctos horribilis is a widely recognized subspecies of grizzly bear that historically existed throughout much of continental North America, including most of western North America from the Arctic Ocean to central Mexico (Hall 1984, pp. 4–9; Trevino and Jonkel 1986, p. 12). The continental range of the grizzly bear began receding with the arrival of Europeans to North America, with rapid extinction of populations from most of Mexico and from the central and southwestern United States and California (Craighead and Mitchell 1982, p. 516). Current populations continue to thrive in the largely unsettled areas of Alaska and northwestern Canada, while populations within the contiguous 48 States are much more fragmented.

Grizzly bears in the lower 48 States experienced immense losses of range primarily due to human persecution and reduction of suitable habitat (82 FR 30508, June 30, 2017). Prior to the arrival of Europeans, the grizzly bear occurred throughout much of the western half of the contiguous United States, central Mexico, western Canada, and most of Alaska (Roosevelt 1907, pp. 27–28; Wright 1909, pp. vii, 3, 185–186; Merriam 1922, p. 1; Storer and Tevis 1955, p. 18; Rausch 1963, p. 35; Herrero 1972, pp. 224–227; Schwartz et al. 2003, pp. 557–558). Pre-settlement population levels for the western contiguous United States are believed to have been in the range of 50,000–100,000 animals (Servheen 1989, pp. 1–2; Servheen 1999, pp. 50–51; USFWS 1993, p. 9). In the 1800s, with European settlement of the American West and government-funded bounty programs aimed at eradication, grizzly bears were shot, poisoned, and trapped wherever they were found (Roosevelt 1907, pp. 27–28; Wright 1909, p. vii; Storer and Tevis 1955, pp. 26–27; Leopold 1967, p. 30; Koford 1969, p. 95; Craighead and Mitchell 1982, p. 516; Servheen 1999, pp. 50–51). Many historical habitats were converted into agricultural land (Woods *et al.* 1999, entire), and traditional food sources such as bison and elk were reduced, eliminated, or replaced with domestic livestock, such as cattle, sheep, chickens, goats, pigs, and agricultural products from bee hives and crops.

The resulting declines in range and population were dramatic. We have estimated that the range and numbers of grizzly bears were reduced to less than 2 percent of their former range in the lower 48 States and numbers by the 1930s, approximately 125 years after first contact with European settlers (USFWS 1993, p. 9; Servheen 1999, p. 51). Of 37 grizzly bear populations present in 1922 within the lower 48 States, 31 were extirpated by the time of listing in 1975, and the estimated population in the lower 48 States was 700–800 animals (Servheen 1999, p. 51).

For the Final Rule and this review, we considered historical range of grizzly bears circa 1850. We determined that this timeframe is appropriate for measuring grizzly bear range because it is a period for which published faunal records document grizzly bear range, descriptions of grizzly bear occurrence, and/or local extirpation events (Mattson and Merrill 2002, p. 1125). It precedes the major distribution changes in response to excessive human-caused mortality and habitat loss (Servheen 1999, p. 51). We define the physical boundaries of the relevant historical range as the lower 48 States, primarily west of the Mississippi River. Approximately 50,000–100,000 grizzly bears were historically distributed in one large contiguous area throughout portions of at least 17 western States (*i.e.,* Washington, Oregon, California, Idaho, Montana, Wyoming, Nevada, Colorado, Utah, New Mexico, Arizona, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and Texas (Servheen 1989, pp. 1–2; Servheen 1999, pp. 50–51; USFWS 1993, p. 9)).

Significant loss of historical range has resulted in fewer individuals distributed in several small, fragmented, and isolated populations. Today, grizzly

Case: 18-36030, 06/21/2019, ID: 11341232, DktEntry: 77, Page 55 of 56

bears in the lower 48 States primarily exist in 4 populations spanning portions of 4 States. Total numbers are estimated at 1,810 individuals (700 in the GYE DPS and 1,110 additional grizzly bears in the lower-48-States entity). Grizzly bear range in the lower 48 States collapsed into small, fragmented, and isolated populations by the mid-1900s (Mattson and Merrill 2002, p. 1134). These alterations have increased the vulnerability of lower-48-States grizzly bears to a wide variety of threats that would not be at issue without such massive range reduction. Several of these threats were identified in the 1975 original listing (40 FR 31734, July 28, 1975), including range loss and isolation, the construction of roads and trails into formerly secure areas, human persecution, and increasing numbers of livestock on national forests.

We considered these threats thoroughly in the Final Rule (82 FR 30520–30535, June 30, 2017), along with other vulnerabilities caused by loss of historical range, such as changes in available food sources, carrying capacity, changes in metapopulation structure, and reductions in genetic diversity and gene flow (see discussion below). Aside from informing the current status of and threats to the GYE DPS, the lost historic range within the United States is informative only for future rulemakings or regulatory actions in the lower 48 States, as the Service did not undertake regulatory action for grizzly bears outside the GYE DPS boundaries.

Impact of Lost Historical Range on the GYE DPS

Humane Society held that the WGL wolf delisting did not adequately consider the impact of lost historical range on the current threats facing the WGL wolf DPS, including reduced genetic variability and vulnerability to catastrophic events. The Final Rule for the GYE DPS thoroughly addressed the current threats to the grizzly bear in light of the lost historical range. We further explain the analysis in the Final Rule in response to public comments.

Grizzly bears historically occurred throughout the area of the GYE DPS (Stebler 1972, pp. 297–298), but they were less common in prairie habitats (Rollins 1935, p. 191; Wade 1947, p. 444). Today many of these habitats are no longer biologically suitable for grizzly bears (82 FR 30510–12, 30551, 30558, June 30, 2017). Grizzly bear presence in these drier, grassland habitats was associated with rivers and streams where grizzly bears used bison carcasses as a major food source (Burroughs 1961, pp. 57–60; Herrero 1972, pp. 224–227; Stebler 1972, pp. 297–298; Mattson and Merrill 2002, pp. 1128–1129). Most of the shortgrass prairie on the east side of the Rocky Mountains has been converted into agricultural land (Woods et al. 1999, entire), and high densities of traditional food sources are no longer available due to land conversion and human occupancy of urban and rural lands (82 FR 30510, 30551, 30558, June 30, 2017). Traditional food sources such as bison and elk have been reduced and replaced with domestic livestock such as cattle, sheep, chickens, goats, pigs, and bee hives, which can become anthropogenic sources of prey for grizzly bears (82 FR 30510, 30551, 30558, 30624, June 30, 2017).

Range reduction within the GYE DPS boundary has resulted in potential threats specific to isolated and small populations, including genetic health, changes in food resources, climate change, and catastrophic events (82 FR 30533–44, June 30, 2017). Small and isolated populations are susceptible to declines in genetic diversity, which can result in population-limiting effects such as inbreeding, genetic abnormalities, birth defects, low reproductive and survival rates, and susceptibility to extinction (Frankham 2005, entire). However, current levels of genetic diversity in the GYE DPS are capable of supporting healthy reproductive and survival rates, as evidenced by normal litter size, no evidence of disease, high survivorship, an equal sex ratio, normal body size and physical characteristics, and a relatively constant population size within the GYE (van Manen 2016, *in litt.*). We concluded that genetic diversity does not constitute a threat to the GYE DPS (82 FR 30535–36, 30609–11, June 30, 2017).

Changes in availability of highly energetic food resources as a result of lost historical range, such as whitebark pine, army cutworm moths, ungulates, and cutthroat trout could influence grizzly bear reproduction, survival, or mortality risk (Mealey 1975, pp. 84–86; Pritchard and Robbins 1990, p. 1647; Craighead et al. 1995, pp. 247–252). Grizzly bears are dietary generalists, consuming more than 266 distinct plant and animal species, and are resilient to changes in food resources (Servheen and Cross 2010, p. 4; Gunther et al. 2014, p. 1). Additionally, whitebark pine loss has not caused a negative population trend or declines in vital rates (IGBST 2012, p. 34; van Manen 2016a, in litt.), and there is no known relationship between mortality risk or reproduction and any other food (Schwartz et al. 2010, p. 662). We concluded in the Final Rule that changes in food resources do not constitute a threat to the GYE DPS (82 FR 30536–40, June 30, 2017).

Climate change may result in a number of changes to grizzly bear habitat, denning times, shifts in the abundance and distribution of natural food sources, and changes in fire regimes. Changes in denning times may increase the potential for conflicts with humans; however, regulatory mechanisms are in place to limit human-caused mortality (see discussion above under *Impact of GYE Delisting on the Lower-48-States Entity*). Grizzly bears have shown resiliency to changes in vegetation resulting from fires (Blanchard and Knight 1996, p. 121), and diets are flexible enough to absorb shifts in food distributions and abundance (Servheen and Cross 2010, p. 4; IGBST 2013, p. 35). We concluded in the Final Rule that climate change is unlikely to pose a threat to the GYE DPS (82 FR 30540–42, June 30, 2017).

The GYE DPS is vulnerable to various catastrophic and stochastic events, such as fire, volcanic activity, earthquakes, and disease. Most of these types of events are unpredictable and unlikely to occur within the foreseeable future, would likely cause only localized and temporary impacts that would not threaten the GYE DPS (82 FR 30542, June 30, 2017), or have never been documented to affect mortality in grizzly bears (disease: IGBST 2005, pp. 34–35; Craighead et al. 1988, pp. 24–84) (82 FR 30533–30534, June 30, 2017).

While range reduction has reduced both numbers of bears and amount of available habitat, the GYE currently supports a population of grizzly bears that meets our definition of recovered, and does not meet our definition of an endangered or threatened species (82 FR 30514, June 30, 2017). Further, we found that potential threats resulting from lost historical range are manageable through conflict prevention, management of discretionary mortality, and the large amount of suitable, secure habitat within the GYE and are not a threat to the GYE grizzly bear DPS now or likely to become a threat in the foreseeable future (82 FR 30544, June 30, 2017). Our regulatory review therefore confirmed that the Service appropriately analyzed the historic range and current status/threats to the GYE DPS, as required under the Act.

Conclusion

After considering the GYE Final Rule in light of the *Humane Society* opinion, along with the best available scientific information, we affirm the determinations of our Final Rule: The

GYE grizzly bear population is discrete from other grizzly bear populations and significant to the remainder of the taxon (*i.e., Ursus arctos horribilis*) and, therefore, a listable entity under the Act in accordance with our DPS Policy; the GYE population has recovered to the point at which protection under the Act is no longer required; and the best scientific and commercial data available indicate that the GYE grizzly bear DPS is not endangered or threatened throughout all or a significant portion of its range. Finally, we determined in the Final Rule, and affirm here, that we will not revisit the 1975 final rule, and grizzly bears, outside the GYE DPS, in the lower 48 States remain listed as threatened. Accordingly, the Service does not plan to initiate further regulatory action for the GYE grizzly bear population, or for the lower 48 States population at this time.

References Cited

A complete list of all reference cited herein is available at *https://www.regulations.gov* in Docket No. FWS–R6–ES–2017–0089, or upon request from the Grizzly Bear Recovery Office (see **FOR FURTHER INFORMATION CONTACT**).

Authority

This document is published under the authority of the Endangered Species Act, as amended (16 U.S.C. 1531 *et seq.*).

Dated: April 24, 2018.

James W. Kurth

Deputy Director, U.S. Fish and Wildlife Service, Exercising the Authority of the Director, U.S. Fish and Wildlife Service.

[FR Doc. 2018–09095 Filed 4–27–18; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 170817779–8161–02]

RIN 0648–XG193

Fisheries of the Exclusive Economic Zone Off Alaska; Greenland Turbot in the Aleutian Islands Subarea of the Bering Sea and Aleutian Islands Management Area

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Greenland turbot in the Aleutian Islands subarea of the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the 2018 Greenland turbot initial total allowable catch (ITAC) in the Aleutian Islands subarea of the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), May 1, 2018, through 2400 hrs, A.l.t., December 31, 2018.

FOR FURTHER INFORMATION CONTACT: Steve Whitney, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2018 Greenland turbot ITAC in the Aleutian Islands subarea of the BSAI is 144 metric tons (mt) as established by the final 2018 and 2019 harvest specifications for groundfish in the BSAI (83 FR 8365, February 27, 2018). The Regional Administrator has determined that the 2018 ITAC for Greenland turbot in the Aleutian Islands subarea of the BSAI is necessary to account for the incidental catch of this species in other anticipated groundfish fisheries for the 2018 fishing year. Therefore, in accordance with § 679.20(d)(1)(i), the Regional Administrator establishes the directed fishing allowance for Greenland turbot in the Aleutian Islands subarea of the BSAI as zero mt. Consequently, in accordance with § 679.20(d)(1)(iii), NMFS is prohibiting directed fishing for Greenland turbot in the Aleutian Islands subarea of the BSAI.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the directed fishing closure of Greenland turbot in the Aleutian Islands subarea of the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as April 5, 2018.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 25, 2018.

Kelly L. Denit,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2018–09018 Filed 4–27–18; 8:45 am]

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