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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CROW INDIAN TRIBE, et al.,
Plaintiffs/Appellees,

v.

UNITED STATES OF AMERICA, et al.,
Defendants/Appellants,

and

STATE OF WYOMING, et al.,
Intervenor-Defendants/Appellants.

Appeal from the United States District Court for the District of Montana
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 (Hon. Dana C. Christensen)

RESPONSE AND REPLY BRIEF FOR THE FEDERAL APPELLANTS

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GLOSSARY

Add.	Statutory and Regulatory Addendum
APA	Administrative Procedure Act
AWR Brief	Brief for Alliance for the Wild Rockies, et al.
Crow Brief	Brief for Crow Indian Tribe
DPS	Distinct Population Segment
E.R.	Excerpts of Record
ESA	Endangered Species Act
F.E.R.	FWS's Further Excerpts of Record
FWS	U.S. Fish and Wildlife Service
GYE	Greater Yellowstone Ecosystem
HSUS Brief	Brief for Humane Society, et al.
IGBST	Interagency Grizzly Bear Study Team
J.S.E.R.	Joint Supplemental Excerpts of Record
Montana Brief	Opening Brief for State of Montana
M.S.E.R.	Montana's Supplemental Excerpts of Record
NCT Brief	Brief for Northern Cheyenne Tribe, et al.
PVA	Population Viability Analysis
WEG Brief	Brief for WildEarth Guardians

INTRODUCTION

Defendants/Appellants U.S. Fish and Wildlife Service, et al. (FWS) respectfully file this combined response to the principal brief of Cross-Appellant Robert Aland (Part VI of the Argument below) and reply to the principal briefs of Plaintiffs/Appellees (Parts I through V of the Argument below).

SUMMARY OF ARGUMENT

1. This Court has jurisdiction over FWS's appeal because FWS seeks reversal of holdings governing the scope of the remand to the agency. The Court routinely exercises jurisdiction over appeals from all quarters seeking to alter the scope of a remand. Moreover, the Court undoubtedly has jurisdiction over the States' appeals, which present the same issues.

2. The best available science supports FWS's finding that the GYE grizzly bears are not threatened by genetic factors, and the district court erred in substituting its interpretation of the scientific evidence for that of FWS's experts. Plaintiffs' arguments to the contrary are meritless: the population is not "too small" to be recovered; natural connectivity to other grizzly bear populations is not a prerequisite to delisting; and the ESA does not forbid reliance on translocation of grizzly bears as a backstop if the GYE population's current robust genetic health should decline.

3. As FWS thoroughly explained in its opening brief, the district court erred in holding that when FWS delists a DPS of a listed species, it must conduct a "comprehensive review" of the entire listed species. Plaintiffs concede that FWS need not conduct "an exhaustive Section 4(a)(1) analysis of any and all

threats affecting the remnant entity," but need only analyze "the impact of threats arising specifically from the Yellowstone DPS delisting." Therefore, this Court should reverse the district court's erroneous holding or, in the alternative, clarify that the required analysis of the larger listed entity is limited to the impact on that entity of threats arising specifically from the DPS delisting.

This Court should also reject (or decline to address) Plaintiffs' argument that when FWS delists a DPS of a listed species, it thereby also creates a "new remnant entity of the listed species." That interpretation is neither compelled by the ESA nor consistent with FWS's previous interpretations. Moreover, that interpretation is unnecessary to a decision—whether reversal or affirmance—on the district court's ruling that FWS must, when delisting a DPS, consider the impact on the rest of the listed species. This Court should therefore leave to FWS the task of interpreting the ESA, in the first instance, to determine what if any legal impact the delisting of a DPS has on the rest of the listed species.

4. Plaintiffs raise a slew of alternative arguments in support of the judgment, but none has merit.

In *Greater Yellowstone Coalition v. Servheen*, 665 F.3d 1015 (9th Cir. 2011), this Court remanded to FWS for further analysis of whether the decline in whitebark pine trees, a significant source of food for the GYE grizzly bear, threatened the species' recovery. In 2013, the Interagency Grizzly Bear Study Team (IGBST) completed a comprehensive report examining the consequences of whitebark pine decline, including the possibility that human-caused mortality would increase as bears searched for alternative foods. It found that whitebark

pine decline does cause increased conflict mortality, but the effect is so small that it has no impact on survival rates and does not threaten the species. Plaintiffs dispute that conclusion, arguing that conflict mortality has soared to "unprecedented" levels as a result of whitebark pine decline. But they are wrong: mortality levels have not spiked; they remain within sustainable limits; and very little conflict mortality is due to whitebark pine decline. Rather, increases in mortality, which are within sustainable limits, are due to the expansion of the GYE grizzly bear's range.

Plaintiffs also argue that existing regulatory mechanisms are inadequate to maintain a recovered grizzly bear population in the GYE. That argument, however, is foreclosed by this Court's decision in *Greater Yellowstone*, which held that the regulatory mechanisms comprising the Conservation Strategy were sufficient. In any event, Plaintiffs' arguments against such mechanisms are otherwise meritless. Moreover, FWS addressed cumulative threats, rationally concluding that they do not threaten the population. Plaintiffs fail to identify any error in that conclusion.

5. Plaintiffs contend that FWS erred as a matter of law in relying on legally non-binding measures such as state management plans in concluding that existing regulatory mechanisms are not inadequate to maintain a recovered GYE grizzly bear population. This Court need not reach that argument because, as it held in *Greater Yellowstone*, the legally binding mechanisms alone are sufficient. Moreover, since that time another court of appeals has upheld FWS's

interpretation of the ambiguous statutory term "regulatory mechanisms" as including state management plans.

Plaintiffs also contend that FWS may not delist a DPS of a listed species, but that argument is inconsistent with the ESA's language and purpose, is contrary to the agency's formal interpretation, and was squarely rejected by the D.C. Circuit. Equally baseless is Plaintiffs' argument that the GYE is a "DPS of a DPS"; to the contrary, the GYE is a distinct population segment of the taxon of grizzly bears. Finally, Plaintiffs' argument that FWS's grizzly bear recovery team must conduct an ESA Section 7 consultation with itself is wholly without precedential support, incompatible with ESA Section 4's exclusive and mandatory requirements, and inconsistent with the lower court's holding that a DPS delisting must consider the impact on the larger listed entity.

6. Cross-Appellant Aland's arguments are meritless. FWS is not estopped from finding the GYE grizzly bear recovered. The ESA's statutory deadlines do not bar subsequent agency action, nor does the ESA require statistical analysis of comments to determine whether listing or delisting decisions are popular. The challenged rule was properly reviewed by qualified peer reviewers, and there is no evidence that FWS based its decision on anything other than the best available scientific and commercial data.

The judgment of the district court should be reversed with respect to its holdings (1) that FWS must conduct a "comprehensive review of the entire listed species" and (2) that FWS arbitrarily concluded that the grizzly bears are not threatened by insufficient genetic diversity.

ARGUMENT

I. This Court has appellate jurisdiction.

Plaintiffs argue that this Court lacks appellate jurisdiction because FWS appealed some, but not all, of the district court's holdings. As elaborated in this Part I, Plaintiffs are wrong for two reasons. First, this Court has often exercised jurisdiction over appeals brought by appellants—including some of Plaintiffs here—that sought not to *reverse* a judgment of remand but to *alter the scope* of the remand; this is such an appeal. Contrary to Plaintiffs' assertions, FWS does not seek an "advisory opinion" or a mere "line edit" of the district court's decision; rather, FWS seeks reversal of holdings that require it to address specific issues on remand. Second, three States have appealed from the district court's judgment in its entirety, and this Court's undoubted jurisdiction over their appeals provides an additional basis for its jurisdiction over all issues.[1]

A. This Court has jurisdiction over FWS's appeal.

This Court has long recognized that federal agencies may appeal remand orders because "agencies compelled to refashion their own rules face the unique prospect of being deprived of review altogether" if an immediate appeal is not available. *Alsea Valley Alliance v. Department of Commerce*, 358 F.3d 1181, 1184 (9th Cir. 2004). "An agency, after all, cannot appeal the result of its own decision." *Id.*

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[1] Because this Court has jurisdiction over both FWS's appeal and the States' appeals, it is unnecessary to address jurisdiction over the private intervenor-defendants' appeals. *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 918 (9th Cir. 2004).

Plaintiffs argue that because this Court could affirm the judgment of vacatur-and-remand even if FWS prevails on all of the issues that it has appealed, FWS's injury is not redressable and FWS lacks standing to appeal. But as Plaintiffs acknowledge, the district court judgment "remanded this matter back to the Service *for further proceedings consistent with its order*." WEG Brief at 18 (emphasis added). If this Court reverses on the agency's issues, then FWS would not have to revise its analysis on those issues, and its consideration of the best available science would not be impacted by the district court's erroneous holdings. Consequently, FWS's injuries are plainly redressable by a favorable judgment from this Court.

The Supreme Court's decision in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 369 (1989), is instructive here. In that case, this Court held that the Army Corps of Engineers violated the National Environmental Policy Act in four ways. The Corps petitioned for certiorari on three of those issues, but accepted a remand to address one issue (cumulative impacts). If, as Plaintiffs argue, an agency's acceptance of a remand on one issue deprives it of standing to appeal other issues, then the Corps would have lacked standing in *Marsh* and the Supreme Court would have lacked jurisdiction. But the Court clearly did not think so; it explicitly acknowledged that the Corps "did not seek review of that [cumulative impacts] holding," *id.*, and it reviewed and reversed the other three holdings in *Marsh* itself and in the companion case of *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332 (1989).

This Court, too, has often exercised appellate jurisdiction over appeals seeking not to reverse a judgment of remand but rather to alter the scope of the remand. In *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1168 (9th Cir. 2011), for example, this Court exercised appellate jurisdiction over an appeal brought by the Sierra Club and Center for Biological Diversity—both of whom are Plaintiffs here—challenging the unfavorable legal rulings on summary judgment that resulted in a "favorable but limited remedial order." Although the government argued (unsuccessfully) that this Court lacked jurisdiction over that appeal because the remand order was not *final* with respect to the appellants, *id.* at 1174-76, the government has never argued—and this Court has never held—that a party affected by a remand order lacks *standing* to appeal to lessen the number of issues that the agency must revisit on remand.

Plaintiffs rely on this Court's per curiam order in *Natural Resources Defense Council v. Gutierrez*, 457 F.3d 904 (9th Cir. 2006), but that case is easily distinguished. *Gutierrez* held that the government lacked standing to challenge the legal rulings underlying the district court's grant of a permanent injunction where the government did not challenge the injunction itself. Critical to the Court's holding was its rejection of the government's argument that the district court's order "effectively remanded" the challenged action to the agency for further proceedings consistent with its order. *Id.* at 906. In this case, by contrast, it is undisputed that the district court in fact remanded. 1 E.R. 49. Whatever may have been the effect of the injunction in *Gutierrez*, it is beyond dispute that in the present case, "the remand order forces the agency to apply a potentially

erroneous rule which may result in a wasted proceeding." *Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir. 1990). This Court's review could obviate that wasted proceeding, and FWS therefore has standing.

Plaintiffs' observation that FWS could have appealed all of the district court's holdings, but chose not to do so, is irrelevant. As the Supreme Court has recognized, the government is "[u]nlike a private litigant who generally does not forego an appeal if he believes that he can prevail." *United States v. Mendoza*, 464 U.S. 154, 161 (1984). The "Solicitor General considers a variety of factors . . . before authorizing an appeal," *id.*, including the need for statutory interpretation by the agency charged with implementing the statute and the likelihood that the matter can be more efficiently resolved by the agency. It would be irrational and inconsistent with judicial efficiency to compel the government to appeal issues that an agency is willing to resolve itself merely in order to appeal other issues. FWS is injured by the holdings that it appeals, and this Court has the undoubted power to order relief that would redress those injuries. Nothing more is required to establish standing to appeal.

Plaintiffs also suggest that because FWS has begun working on those issues it did not appeal, and because it has published a rule reinstating the GYE grizzly bear to the list of threatened species, it has acquiesced in the judgment and may not appeal. Reinstating the GYE grizzly bear on the list was a ministerial act done to comply with the district court's order. *See* 84 Fed. Reg. 37,144 (July 31, 2019). FWS did the same thing after the 2007 rule was vacated, even though it appealed that decision in its entirety. *See* 75 Fed. Reg. 14,496

(Mar. 26, 2010). And beginning work on those issues that FWS did not appeal in no way indicates acquiescence on those issues that FWS *did* appeal (or even on those it did not, as FWS may proceed on parallel tracks).

Finally, the Crow Tribe (joined by some but not all Plaintiffs) argues that FWS may not respond to Plaintiffs' jurisdictional arguments because FWS did not anticipate, affirmatively raise, and rebut those arguments in its opening brief. That argument is wrong for several reasons. First, the "question of standing is not subject to waiver." *United States v. Hays*, 515 U.S. 737, 742 (1995). Second, as the Crow Tribe itself argues, a litigant "does not have to attempt to guess at what argument an opposing party might make." Crow Brief at 7. Although the Crow Tribe asserts that Section 3974.1 of Wright & Miller's *Federal Practice and Procedure* provides "ample case citations" in support of its extraordinary position, Crow Brief at 4, the Crow Tribe fails to reproduce any such citation, and we are aware of none. The only on-point case cited in Wright & Miller holds precisely the opposite. *See Town of Smyrna v. Municipal Gas Authority of Georgia*, 723 F.3d 640, 644 n.1 (6th Cir. 2013) (exercising appellate jurisdiction because appellant "sufficiently addresses our jurisdiction in its reply brief"). The cases cited by the Crow Tribe for the proposition that an appellant generally may not raise new issues in a reply brief are inapposite, because FWS is not raising new issues; it is responding to arguments first raised by Plaintiffs.

In sum, this Court has jurisdiction over FWS's appeal in its own right.

B. The States' appeals provide an additional basis for this Court's jurisdiction.

The States of Wyoming, Montana, and Idaho have also appealed from the district court's judgment, and they will demonstrate in their briefs that this Court has jurisdiction over their appeals. Other courts have recognized that States have standing to challenge listing decisions. *Colorado v. FWS*, 362 F. Supp. 3d 951, 963-64 (D. Colo. 2018); *Maine v. Norton*, 257 F. Supp. 2d 357, 374-75 (D. Me. 2003). "Where the legal issues on appeal are fairly raised by one plaintiff who had standing to bring the suit, the court need not consider the standing of the other plaintiffs." *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 918 (9th Cir. 2004) (internal quotation marks and brackets omitted). Therefore, the States' standing to appeal provides an additional basis for this Court's exercise of jurisdiction over these appeals.

II. The district court erred in rejecting FWS's conclusion that the GYE grizzly bears are not threatened by genetic factors.

As explained in FWS's opening brief (at 28-37), the agency rationally determined that the GYE grizzly bear population is not threatened by insufficient genetic diversity. The district court conceded that FWS "relied on the best available science," 1 E.R. 42, but it held that FWS's grizzly bear experts "misread" and misinterpreted that science. The court's flagrant substitution of its own scientific judgment for that of the agency contravenes this Court's considered mandate that district courts must be "particularly deferential" when reviewing an "agency's predictive judgments about areas that are within the

agency's field of discretion and expertise. *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (en banc); *accord San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014).

Plaintiffs attempt to bolster the district court's erroneous holding with a spate of additional arguments; in the process, they cherry-pick and distort the record to create the illusion that FWS's conclusions are arbitrary and contrary to scientific consensus. WEG Brief at 26-59.[2] In one of the more brazen examples, Plaintiffs fabricate an "admission" by FWS that the GYE's effective population is insufficient for long-term genetic health by altering a quotation without acknowledging that they have done so. *Id.* at 44-45. FWS stated in the Regulatory Review that "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." Add. 9a. That statement is misquoted by Plaintiffs as follows: "the Service recently admitted—as it must—that 'the effective population size and heterozygosity levels of the [isolated Yellowstone grizzly segment] are only adequate *for the next several decades.*' Add. 9a (emphasis added)." WEG Brief at 44 (brackets and emphasis by Plaintiffs). Plaintiffs' unacknowledged alterations—especially the insertion of the word "only" and the deletion of the words "at least"—transform FWS's words from a statement that the GYE's effective population and genetic diversity *are* sufficient into an

[2] Plaintiff Northern Cheyenne Tribe did not adopt this argument. NCT Brief at 3. All other plaintiff conservation groups and tribes did. AWR Brief at 6; HSUS Brief at 2; Crow Brief at 13.

"admission" that they are not. *Id.* at 44-45. As explained below, Plaintiffs' representation of the scientific record is little better.

The reality is that there is some disagreement among scientists about the best way to measure and predict genetic health and about what level of effective or total population is sufficient to sustain it. FWS considered all of the relevant evidence and rationally concluded that the GYE grizzly bear population is genetically healthy, and that the Conservation Strategy's robust post-delisting regulatory mechanisms will ensure that it remains so for the foreseeable future. This Court should reject the attempts of both Plaintiffs and the district court to substitute their scientific judgment for that of the agency.

A. Plaintiffs fail to show that the GYE grizzly bear population is "too small" to be recovered.

Plaintiffs disagree with FWS's decision to base its assessment of the GYE grizzly bear population's genetic health primarily on measurements of the population's heterozygosity (i.e., genetic diversity) and effective population size (i.e., the number of GYE grizzly bears available for reproduction). *See* Final Rule, 1 E.R. 116-17, 191-92. Plaintiffs argue that a different approach known as population viability analysis (PVA) is the best available science, and they assert that PVA studies uniformly support the conclusion that the GYE grizzly bear population is "too small to be deemed biologically recovered." WEG Brief at 34-35.[3] Plaintiffs are wrong on both counts. First, population viability analysis

[3] Cross-Appellant Robert Aland likewise argues that the GYE grizzly bear population is too small to be recovered. Aland Brief at 63-67. FWS's response here applies to his argument as well.

of the GYE grizzly bear population supports FWS's conclusion. 2 E.R. 88-89, 142, 160. Second, the purported superiority of PVA over other approaches is merely Plaintiffs' opinion, possibly related to the fact that "PVA models routinely overestimate extinction risk." 2 J.S.E.R. 343. Given the method's known limitations—which Plaintiffs acknowledge, WEG Brief at 34—FWS reasonably relied on multiple methods to assess genetic health.

FWS explicitly considered PVA in the Final Rule, noting that it is "another tool population ecologists often use to assess the status of a population." 2 E.R. 88-89; *see also* 2 E.R. 142, 160. FWS relied on a 2001 PVA study by Mark Boyce et al. that "focused on grizzly bears of the Greater Yellowstone Ecosystem." 2 J.S.E.R. 306. That study found that "the probability of persistence for the GYE grizzly bear population exceeds 95% even for a 500-year time horizon." 2 J.S.E.R. 315. The 100-year probability of persistence is 98.4%. *Id.*; *see also* 2 E.R. 89. The most relevant PVA study, therefore, supports FWS's finding that the GYE grizzly bear is recovered, and that it is not threatened by genetic factors.

Plaintiffs nevertheless claim that "every" published peer-reviewed PVA study "reveals" that "the Yellowstone grizzly segment is too small to be deemed biologically recovered," citing a string of papers. WEG Brief at 34-35. Not a single one of them, however, is actually about *GYE grizzly bears*. Two of them are about fruit flies. 3 J.S.E.R. 674, 699 (Franklin 1980 and Lande 1995). Most of the remainder attempt to determine a minimum population level applicable to all animals, 3 J.S.E.R. 691 (Traill 2007); 2 J.S.E.R. 357 (Traill 2009); 2

J.S.E.R. 349 (Frankham 2014) or to all vertebrates, 2 J.S.E.R. 337 (Reed 2003). The only study that even purports to analyze grizzly bears focuses more on other species, does not focus on the GYE, and states that it lacked data on grizzly bears. 2 J.S.E.R. 483, 497 (Carroll 2001).

Plaintiffs attempt to dismiss the Boyce analysis because that study's conclusion stated that not enough is known about grizzly bear genetics and future habitat preservation to make a defensible "final assessment" about the viability of grizzly bear populations. WEG Brief at 44 n.4; 2 J.S.E.R. 330. That scientific humility, however, merely underscores that those findings the Boyce study *did* venture to make—including the greater than 95% chance that the GYE grizzly will persist for more than 500 years—are more reliable than the sweeping generalizations in the abstract analyses of the entire animal kingdom that Plaintiffs contend are the best available science. It is hardly likely that those broad surveys incorporated a greater knowledge of grizzly bear genetics or the future of habitat in the GYE than the Boyce study.

Plaintiffs urge this Court to reject FWS's conclusion in favor of the views of Dr. David Mattson, a retired wildlife biologist whose work with GYE grizzly bears ended in 1993. 1 J.S.E.R. 183.[4] In a declaration, Mattson asserted that a

[4] The Final Rule cites much of Mattson's work from the 1980s and 1990s, but he has since adopted an unorthodox approach to science: "what you will *not* find" in my work "is a slavish concern with minimizing type I errors, invoking some inflated notions about contributing to a body of 'truth.' Nor will you find an emphasis on minimizing type II errors." https://www.allgrizzly.org. (Type I errors mean finding something to be true that is not, otherwise known as a false positive; Type II errors mean failing to find something to be true when it is, or a false negative). Mattson also declines to submit his work for peer review. *Id.*

population in the thousands is "currently deemed necessary to ensure long-term viability"; and as the principal author of a letter from a group of "biologists and scholars," he stated that "viable populations of animals such as grizzly bears need to be 2,000-10,000 animals." WEG Brief at 35, 37. The letter, however, cites absolutely nothing in support of that opinion, 1 J.S.E.R. 289, and the declaration relies on the same string of general, non-grizzly bear-focused PVA studies discussed above. 1 J.S.E.R. 191. Repeated invocations of the same evidence do not create a "consensus" that the GYE grizzly bear population is too small to be recovered.

Plaintiffs also argue that FWS's finding that the GYE is not likely to be threatened by genetic factors in the foreseeable future is arbitrary because the current effective population size of 469 still falls slightly short of 500, the effective population size generally considered sufficient to ensure long-term genetic fitness in an isolated population. WEG Brief at 44-45. But what Plaintiffs fail to understand is that that guideline "is based on non-managed populations." 1 J.S.E.R. 191; *see also* 1 J.S.E.R. 157 ("Franklin's [50/500] hypothesis assumed there were no other management or conservation actions in place."). The GYE grizzly bear population is and will remain intensively managed and monitored. *Id.* Monitoring will detect any decline in genetic fitness should it occur, and management will prevent and if necessary respond to any such decline.

FWS's finding that the GYE grizzly bear population is not threatened by genetic factors was supported by robust genetic studies showing that the level of genetic diversity in the GYE grizzly bear population has increased modestly

over the decades and is "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 demographic monitoring area. 2 E.R. 116. Furthermore, the effective population size of 469 is more than four times that necessary to ensure short-term genetic fitness, and it is close to the level that the literature recommends to ensure long-term genetic fitness, even in the absence of management. 2 E.R. 117, 191. FWS's conclusion is further supported by Boyce's PVA analysis. Plaintiffs' citation of other studies supporting their views does not establish that FWS did not rely on the best available science, or that its conclusion was arbitrary and capricious. FWS "is entitled to decide between conflicting scientific evidence. . . . Assessing a species' likelihood of extinction involves a great deal of predictive judgment. Such judgments are entitled to particularly deferential review." *Trout Unlimited v. Lohn*, 559 F.3d 946, 959 (9th Cir. 2009).

B. FWS rationally found that post-delisting measures to facilitate natural connectivity, with translocation as a backstop, will ensure that the GYE grizzly bears remain genetically healthy.

As noted above, FWS reasonably found that GYE grizzly bears are not threatened by insufficient genetic diversity. FWS also found that the addition of "1 to 2 effective migrants from other grizzly bear populations every 10 years would maintain or enhance this level of genetic diversity." 2 E.R. 117. Given that there is "no immediate need for new genetic material," 2 E.R. 116, FWS

did not fix a date certain for translocation of grizzly bears, as it had done in the 2007 rule, when the best available science indicated that the effective population was a quarter of its current size. Instead, the parties to the Conservation Strategy will facilitate natural connectivity through management measures including restricting discretionary mortality between ecosystems, monitoring the population's genetic diversity, and translocating bears between ecosystems if all else fails. 2 E.R. 117. As explained in FWS's opening brief (at 28-37), the agency reasonably concluded that those future management measures are sufficient to ensure that the genetically healthy GYE grizzly bear population will not become threatened by inadequate genetic diversity, and the district court erred in rejecting that conclusion.

Plaintiffs go far beyond what the district court would require, arguing that natural connectivity is a prerequisite to delisting and falsely claiming that FWS itself stated that delisting was "contingent" on it. WEG Brief at 31. The court rejected that disingenuous claim in Plaintiffs' challenge to the 2007 rule, noting that the "1993 Recovery Plan recognized that linking populations of grizzly bears is desirable, but concluded that linkage is 'not essential for delisting.'" *Greater Yellowstone Coalition v. Servheen*, 672 F. Supp. 2d 1105, 1121 (D. Mont. 2009). Plaintiffs quote studies stating that "small" populations are not viable without connectivity, but those studies are not referring to the GYE population, which (at a conservatively estimated 700) is not small. The studies examined populations on the U.S.-Canadian border such as the Selkirk and Cabinet-Yaak ecosystems, 2 J.S.E.R. 386, 433, which respectively contain an estimated 88 and

48 bears, 2 E.R. 90. Other studies on which Plaintiffs rely for the same proposition are not even about grizzly bears at all, nor are they specifically about genetic diversity. WEG Brief at 33. The supposed "mandate for connectivity" is just the opinion of their preferred expert Dr. Mattson, supported by nothing more than the same studies whose limited relevance is explained above (pp. 13-14). *Id.* at 32. FWS's judgment about what approach and what studies are most germane was not arbitrary and is entitled to deference. *Trout Unlimited*, 559 F.3d at 958-59.

Plaintiffs posit four reasons why FWS's determination is allegedly arbitrary. First, and without apparent irony, Plaintiffs claim that FWS may not consider connectivity at all (whether natural or human-assisted) in assessing genetic health, because it "technically involve[s] another 'species,' i.e., grizzly bears outside the Yellowstone grizzly segment," and because "the Service's 'recovery' finding must be based solely on the status of the segment (the species) itself, 'no more or no less.' " WEG Brief at 46. That argument is in considerable tension with the district court's holding (which Plaintiffs support) that FWS cannot delist the GYE DPS without considering the impact on the rest of the species and with Plaintiffs' claim that connectivity is essential to delisting. It is also absurd: genetic connectivity between grizzly bear populations, which Plaintiffs concede is relevant to consider, inherently involves *other* populations.

Next, Plaintiffs argue that FWS's reliance on translocation as a backstop precludes it from finding that the GYE DPS is recovered. WEG Brief 47-48. That argument was squarely rejected by the district court in the previous round

of litigation, 672 F. Supp. 2d at 1122, and by the D.C. Circuit in the strikingly similar case of *Defenders of Wildlife v .Zinke*, 849 F.3d 1077, 1091 (D.C. Cir. 2017) (*Wyoming Wolves*). In *Wyoming Wolves*, the plaintiffs claimed that Wyoming's gray wolf population remained threatened by insufficient genetic connectivity with wolves outside the GYE. FWS explained that post-delisting management would preserve the population's genetic diversity by facilitating natural connectivity, monitoring genetic diversity, and employing "human-assisted genetic exchange as a stopgap measure" if natural connectivity proved insufficient. *Id.* As here, the plaintiffs argued that because the ESA aims to bring species to the point at which its measures are no longer necessary, a species cannot be deemed recovered if conservation measures such as translocation are still potentially needed.

Wyoming Wolves explained that Plaintiffs' argument "proves too much," noting that "if the Service cannot delist a species when live trapping and transplantation may still be necessary, the logic of [Plaintiffs'] interpretation would mean delisting could not occur if other less invasive methods like 'research, census, law enforcement, [and] habitat acquisition' are still necessary." 849 F.3d at 1091 (quoting ESA's illustrative definition of "conservation," 16 U.S.C. § 1532(3)). Moreover, the ESA and its regulations contemplate "continued regulatory protection" after delisting, and so Plaintiffs' "view of the statutory imperative as allowing only an entirely self-sufficient species to be delisted can hardly be correct." *Id.* Plaintiffs attempt to distinguish *Wyoming Wolves* as "species . . . and fact-specific," WEG Brief at 48 n.5, but

there is nothing species-specific about the D.C. Circuit's rejection of Plaintiffs' statutory argument, and the essential facts could hardly be more similar.

Third, plaintiffs quarrel with FWS's supposed finding that delisting the GYE DPS will "foster or improve natural connectivity." WEG Brief at 48. But FWS made no such finding and need not have done so to justify its delisting decision; it simply found that delisting would not cause genetic diversity to decline. In opposition, Plaintiffs once again present the opinions of Dr. Mattson that natural connectivity is unlikely to occur unless the GYE population remains listed. *Id.* at 49. But FWS rationally concluded otherwise due to the narrowing gap between the GYE and NCDE ecosystems as their populations have expanded, documented sightings of bears between those ecosystems, Montana's commitment to manage discretionary mortality between the GYE and NCDE to facilitate natural bear movements, and measures in place on federal lands to prevent bear-human conflicts. 2 E.R. 161-62. Moreover, if natural connectivity does not occur, the rule provides for translocation as a backstop. Therefore, FWS's finding that the GYE DPS is genetically healthy will remain true *with or without* natural connectivity.

Fourth, Plaintiffs argue that neither the Conservation Strategy's measures to facilitate natural connectivity nor the backstop of translocation should be considered because they are allegedly too vague and discretionary. Plaintiffs are wrong as a matter of fact in claiming that some of the post-delisting measures are discretionary. As explained further below (pp. 48-49), they are also wrong as a matter of law in asserting that only legally binding measures count. This Court

declined to decide that legal issue in the previous appeal.[5] But the D.C. Circuit subsequently squarely upheld FWS's interpretation of the ambiguous term "regulatory mechanisms" as including management plans that explain how a State intends to exercise its authority to manage wildlife. *Wyoming Wolves*, 849 F.3d at 1082-83. FWS thus appropriately relied on Wyoming's grizzly bear management plan, which explicitly discusses translocation as a response if "genetic issues become a concern in the future," 3 J.S.E.R. 588-89, and on Montana's management plan and regulations, which include a complete ban on grizzly bear hunting in certain key connectivity areas between the GYE and the NCDE, *see* Montana Brief at 32-33; M.S.E.R 4.

Plaintiffs' characterization of the regulatory measures in place to prevent and reverse any decline of the GYE grizzly bear population as "discretionary," WEG Brief at 55, is contrary to the record. In fact, the rule clearly provides that if the population inside the demographic monitoring area falls below 600, then "there will be no discretionary mortality" except "as necessary for human safety." 2 E.R. 95. All three States have implemented that requirement through multiple mechanisms, including legally binding regulations. 2 E.R. 115.

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[5] In the previous appeal, this Court reversed the district court's holding that FWS "relied on too many measures that were not legally binding and failed to explain adequately how the legally binding measures would protect the grizzlies." *Greater Yellowstone Coalition*, 665 F.3d at 1030. Because it held that the legally binding measures alone supported FWS's conclusion, the Court did not find it necessary to decide whether legally non-binding measures qualify as "regulatory mechanisms" within the meaning of 16 U.S.C. § 1533(a)(1)(D), although it recognized that they are "not a legal nullity." *Id.; but see id.* at 1034 (Thomas, J., dissenting) (stating that "regulatory mechanisms" must be legally binding).

Mortality necessary for human safety is permitted even now, with the species listed as threatened. In the unlikely event that the GYE population falls below 600, therefore, discretionary mortality within the demographic monitoring area will essentially return to the status quo before delisting. Plaintiffs protest that bears outside that area will continue to be subject to discretionary mortality, and do not count towards mortality limits; however, bears outside the demographic monitoring area are not counted towards the population estimate either. The mortality of such bears cannot logically be subtracted from a population estimate that did not include them in the first place.

Plaintiffs also incorrectly assert that translocation "is not mentioned in the delisting rule." WEG Brief at 51. In fact, the Final Rule explicitly states that the Interagency Grizzly Bear Study Team (IGBST) "will continue to monitor genetic diversity of the GYE grizzly bear population so that a possible reduction in genetic diversity due to the geographic isolation of the GYE grizzly bear population will be detected and responded to accordingly with translocation of outside grizzly bears into the GYE." 2 E.R. 117; *see also id*. ("Translocation of bears between these two ecosystems will be a last resort" if needed); 2 E.R. 191 ("movement of grizzly bears between ecosystems may occur naturally or through management intervention").

For a species to be deemed recovered, FWS must find that it is not imperiled by, among other things, "the inadequacy of existing regulatory mechanisms." 16 U.S.C. § 1533(a)(1)(D). FWS rationally concluded that the GYE grizzly bear population is genetically healthy, and that state and federal

efforts to facilitate natural connectivity, backstopped by translocation, will ensure that it remains so in the future. The district court rejected that conclusion because it preferred a different regulatory mechanism—translocation by a fixed date—which it believed would better ensure continued genetic health. Plaintiffs similarly argue that the rule's claim that federal and state managers are working together to facilitate connectivity is "disingenuous and inaccurate," WEG Brief at 59, because FWS and the States could have done more to protect grizzly bears outside the demographic monitoring area, such as expanding it or prohibiting all discretionary mortality between the GYE and the NCDE. But the ESA does not require that a species be protected by the "best" or most protective measures possible before it can be delisted; it requires only that regulatory mechanisms not be "inadequate" to maintain the species' recovered status.

FWS rationally concluded that the Conservation Strategy and the States' regulations and management plans met that standard here, and the district court's contrary holding should be reversed.

III. The district court erred in holding that FWS must conduct a comprehensive review of all grizzly bears in the lower 48 before it can delist the GYE DPS.

A. As Plaintiffs concede, the ESA does not require FWS's analysis of the rest of the species to go beyond examining the impact of delisting the DPS.

The district court held that "Section 4 of the ESA demands that the Service consider the legal and functional effect of delisting a newly designated population segment on the remaining members of a listed entity." 1 E.R. 31-32.

FWS does not appeal that holding, and it agrees to perform that analysis in any future rulemaking that delists a grizzly bear DPS while leaving the rest of the lower-48 grizzly bears listed.

The district court also held, however, that the ESA "requires a comprehensive review of the entire listed species" in such rulemakings. 1 E.R. 30. FWS *does* appeal that holding, because as explained in its opening brief (at 23-28), the ESA imposes no such requirement; the district court erred in imposing a procedure not required by statute; and a judicially created mandate to perform a comprehensive review of the entire listed species before delisting, uplisting, or downlisting a DPS would thwart FWS's ability "to provide different levels of protection to different populations of the same species" as Congress intended in enacting the DPS language. *National Ass'n of Home Builders v. Norton*, 340 F.3d 835, 842 (9th Cir. 2003).

Plaintiffs concede that the ESA does not require FWS to conduct a full five-factor review of the entire listed species when it delists (or uplists) a distinct population segment of that species. NCT Brief at 33-36. They offer no argument in support of the district court's holding that the ESA requires a comprehensive review of the entire species, nor do they rebut any of FWS's arguments against it. Instead, in an attempt to evade this Court's review, they deny that the district court intended any such holding. Plaintiffs argue that the court, in holding that the ESA "requires a comprehensive review of the entire listed species and its continuing status," meant only that FWS must analyze "the impact of threats arising specifically from the Yellowstone DPS delisting, not an exhaustive

Section 4(a)(1) analysis of any and all threats affecting the remnant listed entity." *Id.* at 35 n.3. They argue that FWS's "confusion" about the meaning of the district court's holding does not warrant this Court's review.

In situations such as this, where the appellant is aggrieved by a district court holding and the appellees argue that the adverse holding can be interpreted away, it is appropriate for this Court to clarify the district court's order. In *Conner v. Burford*, 848 F.2d 1441, 1460-61 (9th Cir. 1988), for example, the appellants appealed an order that they claimed terminated their oil and gas leases. This Court found it "not clear that the district court actually intended to set aside the leases" and noted that the appellees had proffered an interpretation that did not yield that result. "Whether or not [appellees' interpretation] is a correct interpretation of the district court's intent," this Court held, "we now clarify the order to assure it has that effect." *Id.*

A similar clarification, or else a reversal, is needed here. Plaintiffs' agreement that FWS need not conduct the comprehensive review of the entire species set forth in Section 4(a) of the ESA when it delists a DPS is welcome, but it does not change the fact that the district court stated that a "comprehensive review of the entire listed species" is required. Accordingly, this Court should either reverse that erroneous holding for the reasons set forth in FWS's opening brief (at 23-28) or clarify that it means what Plaintiffs say it means: that FWS, when it delists a DPS of a listed species, must address the "impact of threats arising specifically from" the DPS delisting. NCT Brief at 35 n.3.

B. Plaintiffs' interpretation of the ESA should not be adopted by this Court.

Although the question whether FWS must consider a DPS delisting's *impact* on the rest of the species is distinct from the question whether the agency must conduct a *comprehensive review* of the entire listed species, Plaintiffs conflate the two questions and offer the same two arguments in support of both. First, they offer an interpretation of the ESA's text that is not compelled by the statute and is inconsistent with FWS's prior interpretations. NCT Brief at 25-26. Alternatively, they argue that the Administrative Procedure Act (APA) requires consideration of a DPS delisting's impact on the rest of the species because it is "an important aspect of the problem." *Id.* at 27-28. As for the APA, FWS did in fact consider the DPS delisting's impact in the Regulatory Review. Add. 5a-11a.

As for the ESA, Plaintiffs' interpretation could have unforeseen and unintended consequences, and resolution of the issue is not necessary to this Court's decision. Plaintiffs' argument begins unobjectionably, observing that the ESA requires FWS to maintain a list of all endangered and threatened species that specifies "with respect to each such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range," and to revise that list "from time to time" to "reflect recent determinations." 16 U.S.C. § 1533(c)(1). Any such determinations must be based solely on the best available scientific and commercial data, *id.* § 1533(b), and must be based on the five-factor analysis set forth in section 4(a), *id.* § 1533(a). Thus, when FWS recognizes a DPS of a listed species and proposes to delist that DPS, it must

apply Section 4(a)'s five-factor analysis to determine whether the DPS is endangered or threatened, and it must rely on the best available scientific and commercial data in so doing. If FWS concludes that the DPS is not endangered or threatened, then it must update the list to exclude that portion of the range occupied by the recovered DPS. That much is undisputed.

Plaintiffs' argument goes off the rails, however, in asserting that when FWS performs its duty under Section 4(c) to update the list to reflect recent determinations about the portion of its range over which a species is endangered or threatened, FWS "thereby creat[es] a new remnant entity of the listed species" in addition to the DPS. NCT Brief at 26. That assertion is created out of whole cloth. Nothing in the ESA provides that when FWS delists a DPS of a listed species and updates the geographic description of where that species is threatened or endangered, the already-listed species is automatically transformed into a "new remnant entity" by operation of law.

Plaintiffs' argument confuses a *species* with a *listing.* Although the terms have sometimes been casually used interchangeably, it is necessary here to be more precise. A "species" is what Congress defined it to be: a full taxonomic species, a subspecies, or a DPS. 16 U.S.C. § 1532(16). A listing, on the other hand, is an undefined shorthand term that describes an entry on the list containing all of the information required by Section 4(c): the species' common and scientific names, the specification of the portion of its range over which it is threatened or endangered, and the specification of its critical habitat. *Id.* § 1533(c). Updating a species' *listing* to reflect recent determinations about

the portion of its range over which it is endangered or threatened or about its critical habitat amends the *listing*, but it does not thereby create a new *species*.

Plaintiffs are urging an interpretation that is not compelled by the ESA's text and is at odds with FWS's previous interpretations. *See* Add. 6a (*Regulatory Review*); Solicitor's Opinion M-37018, at 5 & n.8. It is also unnecessary to a decision in this case. This Court could either affirm or reverse the district court's holding that FWS must consider the impact of delisting a DPS on the rest of the listed species on other grounds without reaching Plaintiffs' flawed argument about the ESA. The Court should therefore either reject or decline to address that argument and give the agency charged by Congress with implementing the ESA the first opportunity to determine what if any legal impact the delisting of a DPS has on the rest of the listed species.

In any event, the Court should reverse the district court's holding that FWS must conduct a comprehensive review of all grizzly bears in the lower 48 before it can delist the GYE DPS.

IV. Plaintiffs' alternative factual arguments in support of the district court judgment do not warrant vacatur of the Final Rule.

A. FWS rationally found that the GYE grizzly bear population is not imperiled by a more meat-based diet.

Historically, whitebark pine seeds have been a significant food source for about two-thirds of the GYE grizzly bear population during years of good cone production (about every 2-3 years). Starting around 2000, however, an outbreak of mountain pine beetles caused a sharp decline in the number of whitebark pine

trees in the GYE. Blister rust, an infection present in the GYE since 1937, increased the impact on smaller trees, although it affected fewer than 1% of larger trees. The beetle infestation peaked in 2009, and the number of whitebark pines has remained fairly stable since 2010. 4 J.S.E.R. 807; F.E.R. 18-20.

In the 2007 delisting rule, FWS noted the then-ongoing decline in whitebark pine but found that it would not threaten the GYE grizzly bear population because whitebark pine seed production had always varied wildly from year to year; grizzly bears are adaptable omnivores; and the population had continued to grow despite the decline in that food source. This Court held that FWS's conclusion was not adequately supported by the record because the data showing population growth largely predated the decline in whitebark pine, and because FWS had not adequately explained whether bears forced to search for alternative foods would experience increased mortality from conflict with humans. *Greater Yellowstone*, 665 F.3d at 1026. "It may be that scientists will compile data demonstrating grizzly population stability in the face of whitebark pine declines," this Court held, but that information "simply is not in the record before us." *Id.* at 1030.

Now it is. In December 2013, the IGBST released a comprehensive report, surveying its own up-to-date data and more than 200 scientific sources, "to address the primary questions posed by the 9th Circuit Court regarding the potential influence of whitebark pine decline on the Yellowstone grizzly bear population." 4 J.S.E.R. 793, 809. That study concluded that "whitebark pine decline has had no profound negative effects on grizzly bears at the individual

or population level." 4 J.S.E.R. 831. A 2016 study by van Manen et al. likewise concluded that "slowing of population growth during the last decade was associated more with increasing grizzly bear density than the decline in whitebark pine." F.E.R. 21.

Contrary to Plaintiffs' claim, NCT Brief at 51, FWS's analysis on remand did not "principally focus[]" on whether the grizzly bears would be able to find alternative food sources, an "uncontroversial" question that this Court held was satisfactorily answered in the affirmative even in the 2007 rule. 665 F.3d at 1026. FWS comprehensively examined all the potential impacts of whitebark pine decline, including the question that Plaintiffs raise on appeal—whether human-caused mortality has increased as a result of bears seeking alternative food sources. 2 E.R. 118-20; *see also* 4 J.S.E.R. 819-27.

Whitebark pines produce large cone crops every two or three years in the GYE. 2 E.R. 118. The IGBST found that years of poor cone production *were* associated with higher mortality, but the effect was small. Specifically, the IGBST found that "approximately six more independent females and six more independent males die across the ecosystem in poor versus good whitebark pine years" from human conflicts. *Id*. In years with the worst cone production, an increase of 10 female mortalities per year would be expected. 4 J.S.E.R. 821. That increase in mortality was so small it did not alter survival rates: the annual survival rate for adult females and juveniles from 2002-2011, during the height of whitebark pine decline, remained the same (0.95) as it was from 1983-2001, before the decline began, and adult male survival rates actually increased from

0.87 to 0.95. 4 J.S.E.R. 829. Nor did poor cone production cause the population to decrease or cause recovery criteria to be violated. 4 J.S.E.R. 831; 2 E.R. 119.

Although the population did not decline, it did grow more slowly from 2002 to 2011 than it had from 1983 to 2001. The 2002-2011 period coincided with a decrease in whitebark pines, but it was also characterized by "increasing population density after decades of robust population growth," 4 J.S.E.R. 822, which can slow population growth through several mechanisms, 2 E.R. 88; 4 J.S.E.R. 825. In order to determine whether increased density or whitebark pine decline was slowing population growth, the IGBST examined whether home ranges had increased (as would be expected if bears were roaming more widely in search of alternative foods) or decreased (as typically occurs when food is abundant but density increases). 2 E.R. 119, 4 J.S.E.R. 822-23. It found that female home ranges had decreased over time, but the decrease "showed no relationship with the amount of whitebark pine in the home range." *Id.* Male home ranges did not change in size. *Id.*

The IGBST also found that density, but not whitebark pine decline, was associated with lower cub-survival rates. *Id.* The 2016 van Manen study likewise found that "[c]ub survival and reproductive transition were negatively associated with an index of grizzly bear density, indicating greater declines where bear densities were higher," but the data "did not support a similar relationship for the index of whitebark pine mortality." F.E.R. 21.

In accordance with those findings, FWS determined that the slowing of the population's growth rate since the early 2000s is "more indicative of the

population approaching carrying capacity than a shortage of resources." 2 E.R. 119. It concluded that the decline in whitebark pine does "not constitute a threat to the GYE grizzly bear DPS now, nor are such changes anticipated to constitute a threat in the foreseeable future." 2 E.R. 121.

Plaintiffs repeatedly assert that mortality from human conflicts has recently soared to "unprecedented" levels and suggest that this alleged increase is due to the decline in whitebark pine. Plaintiffs are wrong as a matter of both fact and logic. First the facts: current mortality levels are neither "unprecedented" nor unsustainable. Plaintiffs' claim to the contrary relies on a selective presentation of the facts. They suggest that the population is in decline by focusing on 2014 to 2016, a peak-to-trough interval. NCT Brief at 12, 58. The longer-term population trend, however, is stable. 2 E.R. 88, 121. Indeed, the estimated populations for 2012 and 2017 are exactly the same: 718. F.E.R. 81; 2017 Annual Report.

Similarly misleading is Plaintiffs' statement that female mortality "increased by *18* (from seven to 25) between 2014 and 2015 alone." NCT Brief at 55. Female mortality hit its lowest level of the decade (7) in 2014, and its highest (25) in 2015. F.E.R. 45, 57. The year before, it was 18, F.E.R. 70 (2013 Report), and the year after, it fell again to 12, F.E.R. 17 (2016 Report). Plaintiffs imply that 2016 was an anomaly, stating that female mortalities "spiked" to 21 in 2017. 2017 Annual Report at 37. But then they fell again to 15 in 2018. 2018 Summary. Moreover, while the absolute *number* of mortalities has increased since the 1990s as a natural result of the population's numerical and geographic

expansion, mortality *rates* remain within sustainable limits. 2 E.R. 149-50. The rule sets mortality limits that vary based on the population estimate, providing that the recovery criteria will be violated if those limits "are exceeded for any sex/age class for three consecutive years." 2 E.R. 95, 150. While occasional single-year exceedances have occurred, mortality has never violated the recovery criteria for any age or sex class, and the population has remained stable.[6]

Plaintiffs' argument also fails as a matter of reason. They contend that FWS's conclusions are arbitrary because conflict mortality in recent years has exceeded the 12 additional deaths that FWS predicted would result from the decline in whitebark pine. But that is a non-sequitur: FWS never said that *total* conflict mortality would average 12 per year or that other factors, such as the population's numerical and geographic expansion, could not cause additional conflict mortality. FWS's finding was simply that *whitebark pine decline* could increase annual mortality by 12 bears. Plaintiffs identify no evidence to support their hidden premise that any further increases in conflict mortality are attributable to the decline of whitebark pine, and the weight of the evidence is

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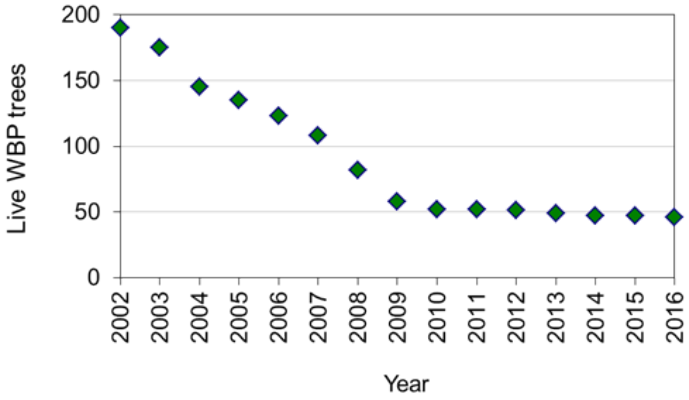
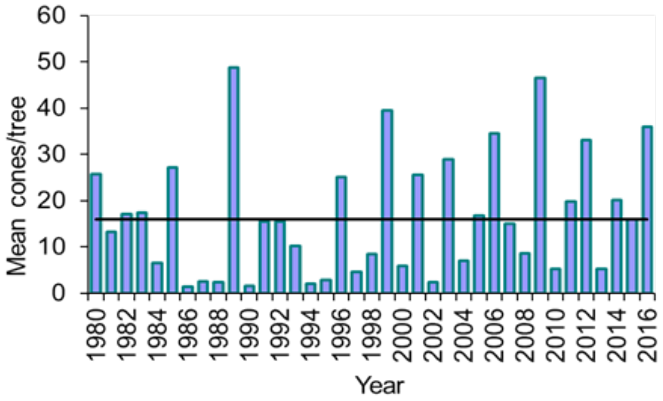
[6] Plaintiffs also rely heavily on "Figure 1" in their brief, a graph prepared by Dr. Mattson. NCT Brief at 12, 53; 4 JSER 929, 934. Mattson's graph visually exaggerates increases in mortality by making units on the y-axis (mortalities) bigger than units on the x-axis (years), and by including the years 1990-2000, when the population was much smaller, further crowding the x-axis. *See* 1 J.S.E.R. 47 (estimating 1993 population at 236). As a result, small increases in the number of mortalities appear as a steeply rising line. Most importantly, the graph ignores the fact that mortality *rates* (i.e., mortality as a percentage of population), not the absolute number of mortalities, are the relevant indicators of population stability.

against it. The beetle infestation peaked in 2009, and the number of live trees in monitored transects has remained fairly constant since 2010, as shown below:



F.E.R. 20. The number of cones per tree has remained at or above the historical average over all of the years in which Plaintiffs contend that conflict mortality has risen.



Id. If, as Plaintiffs argue, whitebark pine decline were causing a "dramatic spike" in mortality, then one would have expected such a spike in 2013 (when cone production was exceptionally poor) and less conflict mortality in surrounding years of good cone production. But in fact, 2013 saw the fewest conflict mortalities in this decade—only 15—despite having the lowest cone production.

F.E.R. 68. The bumper-crop years of 2012 and 2016, by comparison, coincided with conflict mortalities of 29 and 35, respectively. F.E.R. 15, 81.

As FWS explained in the Final Rule, higher numbers of conflict-related deaths are a product of the population's numerical growth and geographic expansion. 2 E.R. 149. As grizzly bear range has expanded outside the secure habitat of the Primary Conservation Area and even outside the demographic monitoring area, mortalities are disproportionately occurring in newly occupied areas due to the human-dominated nature and resulting conflicts in those lands. *Compare* 2 E.R. 265 (map of where females with cubs were sighted) *with* F.E.R. 16 (showing location of 2016 mortalities). As FWS explained, therefore, increased conflict mortality is a problem of success: it is a side effect of the population's growth and expansion outside core protected habitat, not a result of the early-2000s decline in whitebark pine. 2 E.R. 119-20, 149.[7]

B. Plaintiffs' challenges to the adequacy of regulatory mechanisms are meritless.

1. This Court's holding in *Greater Yellowstone* that regulatory mechanisms are adequate controls here.

Section 4 of the ESA requires FWS, in evaluating a species' conservation status, to determine whether the species is imperiled by "the inadequacy of existing regulatory mechanisms." 16 U.S.C. § 1533(a)(1)(D). In litigation over

[7] A good visual presentation of the expansion of GYE grizzly bears' range from 1990 to 2018 is provided at https://www.usgs.gov/media/images/animated-image-showing-grizzly-bear-range-expansion-gye-1990-2018. The yellow line marks the Primary Conservation Area, and the blue line marks the demographic monitoring area.

the 2007 rule, the district court held the Conservation Strategy inadequate because it included measures that were not legally binding. This Court reversed, holding that the legally binding components of the Conservation Strategy *alone* were sufficient to support FWS's determination that the GYE grizzly bear is not threatened by inadequate regulatory mechanisms. *Greater Yellowstone*, 665 F.3d at 1031.[8] "Most importantly," this Court held, the Conservation Strategy's measures are binding on the National Park Service and the U.S. Forest Service, which between them manage 98% of the land in the Primary Conservation Area, which supports "the vast majority of the Yellowstone grizzly population." *Id.*

This Court's holding that the regulatory mechanisms comprising the Conservation Strategy are adequate to protect the GYE grizzly bear DPS is binding here under both law of the case and law of the Circuit. *Old Person v. Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002). In order to challenge the regulatory mechanisms in the current Conservation Strategy, therefore, Plaintiffs must show that those mechanisms are materially different from the ones upheld in *Greater Yellowstone.* But they are not. Plaintiffs argue that it "is no longer the case" that binding measures effective on National Park Service and Forest Service land suffice to protect the population, and they imply that the States now have greater regulatory authority over mortality than they did under the previous Conservation Strategy. HSUS Brief at 61. But when directly questioned on that

[8] This Court declined to decide in *Greater Yellowstone* whether regulatory mechanisms are limited to statutes and regulations. As explained in the text below (pp. 48-49), they are not.

point at argument, Plaintiffs admitted that the States' authority under the current Conservation Strategy is the same as in the one approved by this Court:

> THE COURT: And, Mr. Arrivo, you're telling me that that is a substantive difference from what the regulatory mechanisms provided for . . . during the time period here when these *Greater Yellowstone Coalition* cases came down? Is that what you're saying?
>
> MR. ARRIVO: It is not different . . . .

F.E.R. 5; *see also* 2 E.R. 178 (explaining that relevant regulatory mechanisms have not changed); *cf.* 2 E.R. 115 (suggesting that the current strategy may have *stronger* protections than its predecessor because now "States have incorporated the total mortality limits for each age/sex class . . . in the Tri-State MOA *and State regulations*" (emphasis added)). The district court properly held that the current Conservation Strategy (except where it actually had changed) is "largely the same as that considered in *Greater Yellowstone*," and that this Court's decision foreclosed Plaintiffs' repeat challenge. 1 E.R. 34. This Court should similarly reject Plaintiffs' attempt to relitigate issues decided in the previous appeal.

2. Regulatory mechanisms are not inadequate to prevent conflict mortality from imperiling the GYE grizzly bear.

Plaintiffs argue that the Conservation Strategy is inadequate to control the "escalating threat" of conflict mortality, and that this argument is not foreclosed because the supposed spike in mortality is related to the decline of whitebark pine, which this Court held was *not* sufficiently addressed by the previous Conservation Strategy. NCT Brief at 64-65. This attempt to graft a challenge to regulatory mechanisms already upheld by this Court onto the whitebark pine

issue is unfounded. As shown above (pp. 30-36), the supposed dramatic escalation in conflict mortality is an illusion created by cherry-picking data, and the undramatic long-term increases are not related to whitebark pine decline but instead reflect population growth, increased density, and range expansion.

Even if Plaintiffs' argument were not foreclosed, their challenges are meritless. Plaintiffs complain that the Conservation Strategy does not preclude management removals even if mortality limits are reached, but that is equally true under ESA protection. 2 E.R. 110. The same is true for the Strategy's allowance of mortality "necessary for human safety" even if the population were to fall below 600. *Id.* Plaintiffs note that state wildlife managers will not be required to attempt to relocate depredating bears before resorting to removal, but they do not even attempt to show that this change will threaten the GYE grizzly bears. NCT Brief at 62. First, the mortality limits by which all States have agreed to be bound include all sources of mortality, and so States have incentives not to use up the available mortality with unnecessary removals. Second, as this Court held in *Greater Yellowstone*, 665 F.3d at 1032, the ESA does not require post-delisting regulatory mechanisms to be "commensurate with those provided by the ESA itself." Moreover, lethal removal only as a last resort will continue to be the rule inside the PCA, 2 E.R. 164, where the majority of the population exists and 98% of the land is managed by federal agencies. 665 F.3d at 1031.

The Final Rule and the Conservation Strategy both explicitly state that "Any mortality that exceeds allowable total mortality limits in any year will be subtracted from that age/sex class allowable total mortality limit for the

following year," 2 E.R. 113; 3 E.R. 335, but Plaintiffs ask this Court not to believe it. They argue that, because Wyoming and Idaho adopted regulations providing that *hunting* mortality exceeding annual limits will be subtracted from the following year's allowable mortality, any excess mortality from other causes will not be subtracted. NCT Brief at 61 (citing 4 J.S.E.R. 792 (Idaho), 901 (Wyoming)). That is incorrect. The Memorandum of Agreement, by which all three States committed to implement the Conservation Strategy, provides that the signatories will meet each January to "collectively establish discretionary mortality limits . . . based upon the following allocation protocol." 3 J.S.E.R. 514. That protocol unambiguously requires them to subtract the previous year's "number of mortalities above the limit"—not just those attributable to hunting—from the mortality for the coming year. 3 J.S.E.R. 513-14. All three States' regulations require immediate closure of hunting seasons if that limit is reached. Thus, both the Memorandum of Agreement *and* the States' regulations are consistent with the Final Rule's accurate statement that *all* excess mortality will be subtracted from the following year's limit. FWS's conclusion that those regulatory mechanisms—in addition to the unchanged ones already held adequate by this Court—adequately protect the GYE grizzly bear is rational, supported by the record, and should be upheld.

3. Multiple regulatory mechanisms prevent Plaintiffs' runaway mortality scenario from becoming reality.

Plaintiffs also allege that "the Conservation Strategy, if implemented *exactly as written*, would generate a 50% chance of unsustainable levels of

mortality," completely undetected, which they further allege would cause the population to fall below the recovery criteria's hard minimum of 500. HSUS Brief at 49. They also claim that FWS "acknowledged this flaw." *Id.* Plaintiffs contend that *Greater Yellowstone* does not foreclose their claim because it did not directly address this argument, but that is irrelevant. As explained above, the regulatory mechanisms undergirding this Court's holding are "largely the same," 1 E.R. 34, and this Court's holding that those mechanisms are adequate to protect the population is therefore controlling. At any rate, Plaintiffs' argument is meritless.

The Conservation Strategy sets mortality limits that are designed to maintain the population inside the demographic monitoring area around the 2002-2014 average of 674. 2 E.R. 96. Those mortality limits are lower for adult female bears than for males, because adult female survival has the greatest influence on population trajectory. 2 E.R. 94, 96. The limits also vary with the population level. When the population is at or below 674, mortality limits are set at a level that the best available science indicates will lead to a population increase. 2 E.R. 136. When it is above 747, mortality rates are set at a level that, if met, would likely allow the population to return back to the long-term average of 674. 2 E.R. 172. And when it is between 674 and 757, mortality rates are set at an in-between level to encourage stability.

The Conservation Strategy requires the use of the Chao2 method for estimating the size of the GYE grizzly bear population. Although Chao2 substantially underestimates the population, 2 E.R. 136, it is considered the best

available science because it is better than other currently available models at detecting changes in population trend. The Chao2 method works by producing an estimate of the number of unique females with cubs-of-the-year, which is then used to derive an estimate of total population. 2 E.R. 143. Plaintiffs argue that because the mortality limits are higher for males, but the Chao2 method counts only females, male mortality will go undetected. They speculate that a "vicious cycle" could occur: males could decline dramatically, but population estimates based on observations of female bears would not reflect that decline, meaning that mortality rates would not be reduced, leading to yet more male mortality and ultimately to "catastrophic population decline." HSUS Brief at 46-48.

That argument sounds plausible at first blush, but it is premised on the false claim that the Chao2 method requires "a fixed 1:1 male-to-female ratio." HSUS Brief at 47. That is simply not true. The male-to-female ratio is *currently* 1:1 because at present male and female bears have equal survival rates, but the ration has not always been 1:1 and it is not fixed. Rather, as FWS explained, "the rates and ratios we use to derive a total population estimate are based on our known-fate analyses." 2 E.R. 172. The IGBST will continue, as it has done for decades, to monitor vital rates and track mortality of female *and* male bears, and will "update these rates and ratios if they change." *Id.*; *see also* F.E.R. 17, 44, 57, 70, 83 (IGBST annual reports, documenting male and female mortality and population). Thus, if "male survival declines, this would lead to lower estimates of a total population size through changes in the sex ratio, which would eventually change mortality thresholds as specified in this final rule and the 2016

Conservation Strategy." *Id.* The idea that population decline would go undetected and uncorrected is therefore unrealistic, and Plaintiffs' claim that FWS "acknowledged" that purported flaw is patently false.

FWS did acknowledge that if mortality limits were reached every year then there is a 50% chance that the population would decline, *id.*, but the mortality limits are just one piece of a framework of regulatory mechanisms and management strategies that work together to maintain a recovered population in the monitoring area. A separate requirement mandates a halt to all discretionary mortality, except as necessary for human safety, if any population estimate falls below 600. That requirement protects against unsustainable mortality in two ways: directly, by sharply curtailing mortality if the population falls below 600; and indirectly, by powerfully motivating the States to maintain the population well above that level. The States "have a strong incentive to manage within the recovery criteria to maintain management flexibility to respond to conflict bears," 2 E.R. 113, and have therefore "indicated that they will manage the population around the long-term average" of 674. 2 E.R. 172.

FWS also acknowledged that there is a "lag time" between the occurrence of mortality and the detection thereof, with the consequent "potential" to exceed annual mortality thresholds. *Id.*; 6 J.S.E.R. 1336. But again, the mortality limits do not exist in a regulatory vacuum; many other mechanisms prevent potential excess mortality from causing the runaway mortality that Plaintiffs imagine. First, the IGBST's mortality estimate does not count only known and reported mortalities; rather, it also "includes a statistical estimate of the number of

unknown/unreported mortalities," thus reducing the lag time that might occur if mortalities were not counted until they were discovered. 2 E.R. 172.

Second, as explained above, "any mortality that exceeds allowable total mortality limits in any year will be subtracted from that age/sex class allowable total mortality limits for the following year." 2 E.R. 173. Thus, even if mortality thresholds were exceeded, that excess mortality will be compensated for the following year, rather than compounding year after year as Plaintiffs imagine. And again, if the population inside the demographic monitoring area were to fall below 600, all discretionary mortality would halt except as necessary for human safety, allowing the population to climb again. Yet another layer of safety is provided by the use of the Chao2 estimator, which significantly undercounts the actual number of bears. One study found that "a Chao2 model-averaged estimate of 700 bears means that there are approximately 1,050 bears." 2 E.R. 136. The use of a "highly conservative population estimation technique" ensures that "management decisions will also be conservative." 2 E.R. 172.

Thus, Plaintiffs are wrong when they say that FWS "waves away" their concerns about unsustainable mortality with nothing more than "the assurance that the problem is under further study" and promises of "future non-specific 'adaptive management' actions." HSUS Brief at 50. As shown above, FWS responded with specific facts about how population is estimated and mortality limits are set, and with specific regulatory mechanisms that ensure that Plaintiffs' runaway mortality scenario will not occur. That is sufficient to disprove their claim. But Plaintiffs' dismissive characterization of adaptive

management also calls for a response. They place scare quotes around the words every time they use them and derisively describe them as "magic words." This attempt to convey that there is something inherently suspect about the very concept of adaptive management should be rejected. *Id.* at 50-51.

Requiring that future management responses to every future challenge be determined years in advance might force agencies to make arbitrary or unsupported decisions and thus make it easier for Plaintiffs to win lawsuits, but it would not be good for species recovery. The Recovery Plan that brought about the recovery of the GYE grizzly bear and that this Court recognized "has been widely regarded as a success and a model for grizzly recovery plans elsewhere," was based on adaptive management, which simply means ongoing monitoring and response. *Greater Yellowstone*, 665 F.3d at 1020. The Conservation Strategy takes the same approach. The IGBST, which since 1973 "has made the GYE grizzly bear population the most studied in the world," 2 E.R. 89, will continue its essential monitoring work after delisting. The Yellowstone Grizzly Bear Coordinating Committee—comprised of federal, state, tribal, and local government representatives—will carry on the role previously played by the Yellowstone Ecosystem Subcommittee of reviewing the IGBST's data and implementing management responses. 2 E.R. 89, 111. The Conservation Strategy supplies the regulatory framework for those responses, 2 E.R. 96, but adaptive management remains essential to good future management decisions "because new data and new information will require appropriate management responses." 2 E.R. 121; *see also Protect our Communities Foundation v. Jewell*, 825

F.3d 571, 582 (9th Cir. 2016) (approving use of adaptive management to "complement other mitigation measures, and help to refine and improve the implementation of those measures").

C. FWS rationally concluded that cumulative threats do not threaten the GYE grizzly bear.

FWS acknowledged that some of the stressors on the GYE grizzly bear population are "interrelated and could be synergistic," 2 E.R. 125, and it therefore analyzed how those threats could interact with each other. The agency's consideration of possible synergistic or cumulative threats is evident in its extensive discussion of the interaction between whitebark pine decline and human conflicts, 2 E.R. 117-21, 149-50, and in its discussion of climate change impacts, 2 E.R. 121-22. FWS also separately addressed cumulative impacts, concluding that the threats that caused the grizzly bears to become threatened "have been adequately minimized and ameliorated" to the point where they no longer threaten the population individually or cumulatively, as evidenced by the bears' stable population trend and continuing range expansion. 2 E.R. 125. There "will always be stressors acting on the GYE grizzly bear population that lead to human-caused mortality or displacement, but if these are not causing the population to decline, we cannot consider them substantial." 2 E.R. 126. Plaintiffs' allegation that FWS concluded that cumulative effects do not threaten the GYE grizzly bear "without any supporting analysis," WEG Brief at 78, is belied by the record.

Plaintiffs claim that the population is in decline, WEG Brief at 79, but as explained above (pp. 33-34), the record abundantly supports FWS's conclusion that the population trend since 2002 has remained stable. 2 E.R. 88, 121. What Plaintiffs depict as declines are simply the peak-to-trough intervals in a trend that fluctuates around carrying capacity. FWS did not hide that the population estimate fell in 2015, 2 E.R. 146, but Plaintiffs neglect to mention that it rose again in 2016, and that in both years it exceeded the long-term average of 674.

Plaintiffs also contend that FWS illegitimately relied on population trend as a "proxy" for cumulative impacts without justifying how the use of that supposed "proxy" will "mirror reality." WEG Brief at 79. But as FWS explained, population trend is not a proxy for evaluating cumulative impacts; rather, it is "the ultimate metric to assess cumulative impacts to the population." 2 E.R. 125. Population trend "reflects all of the various stressors on the population. This calculation reflects total mortality, changes in habitat quality, changes in population density, changes in current range, displacement effects, and so forth." 2 E.R. 125-26. Plaintiffs do not even attempt to refute FWS's explanation of why population trend is a direct metric of cumulative threats, and FWS's well-reasoned conclusion should be affirmed.

In sum, Plaintiffs' alternative factual arguments in support of the district court judgment lack merit.

V. Plaintiffs' alternative legal arguments in support of the district court's judgment are incorrect.

A. FWS may rely on post-delisting regulatory mechanisms that are not legally binding.

Plaintiffs argue, as they did in *Greater Yellowstone*, that the "rule may be vacated because the Service unlawfully relied on non-binding and unenforceable mechanisms as 'existing regulatory mechanisms.' " HSUS Brief at 53. The Court need not reach that issue for the same reasons it declined to reach the issue in *Greater Yellowstone*: the legally binding regulatory mechanisms, even taken alone, are sufficient to ensure that the GYE grizzly bear population will not become threatened or endangered in the foreseeable future. 665 F.3d at 1030-31.

If the Court does reach this issue, it should join the D.C. Circuit in holding that "regulatory mechanisms" are not restricted to legally binding laws and regulations, for the sound reasons set forth in *Wyoming Wolves*, 849 F.3d at 1082-83. Plaintiffs attempt to distinguish *Wyoming Wolves*, arguing that it "applied the Service's own two-part test" in the Policy for Evaluation of Conservation Efforts (PECE), 68 Fed. Reg. 15,110 (Mar. 23, 2003), and "concluded that the mechanism at issue met it." HSUS Brief at 59. But *Wyoming Wolves* never even discusses the PECE, which "is not applicable to delisting determinations," 2 E.R. 178, merely citing the PECE parenthetically as the source of a quotation in another decision. 849 F.3d at 1084. Rather, *Wyoming Wolves* held that FWS had reasonably interpreted an ambiguous statutory term, and that non-binding state conservation measures such as management plans may be considered as

regulatory mechanisms: "Given Congress's direction that state conservation efforts must be considered, 16 U.S.C. § 1533(b)(1)(A), their consideration as part of the State's 'regulatory mechanisms' is hardly contrary to congressional intent." *Id.* at 1083. This Court should decline Plaintiffs' request to create a circuit split on this issue. *Environmental Protection Information Center v. Pacific Lumber Co.*, 257 F.3d 1071, 1077 (9th Cir. 2001).

B. FWS may recognize and delist a recovered DPS of a species.

Plaintiffs contend that, as a matter of law, FWS may not designate and delist a DPS of a listed species. WEG Brief at 60-63. They also contend that because the GYE DPS was never separately listed, it may not be delisted. *Id.* at 70-73. But both of those arguments were rightly rejected by the D.C. Circuit in *Humane Society*, 865 F.3d at 597, which upheld FWS's interpretation that the ESA permits it to designate and delist a DPS of a listed species. This Court should rule likewise.

As *Humane Society* noted, the ESA "quite plainly allows—actually, requires—the Service to periodically revisit and, as warranted, revise the status of a listed species," and nothing "in that statutory language forbids the recognition of recovered distinct population segments within a listed species." 865 F.3d at 596. FWS's "authority to revise a listing . . . is generally unconditioned, as long as the underlying determination on which the revision is based (here, the finding of a distinct population segment) is grounded in the five statutory listing factors and the best available scientific and commercial data." *Id. Humane Society* found the statute "silent or ambiguous with respect to the

specific issue at hand," and it held that FWS's interpretation "allowing for the designation of a distinct population segment within a listed species is a reasonable reading of statutory text." *Id.* at 597.

FWS's interpretation, which was set forth in Solicitor's Opinion M-37018, reflected "Congress's intent"—evident in its defining "species" to include subspecies and DPSs—"to target the Act's provisions where needed, rather than to require the woodenly undifferentiated treatment of all members of a taxonomic species regardless of how their actual status and condition might change over time." *Id.* FWS's interpretation is also consistent, *Humane Society* held, with the ESA's purpose to foster state cooperation in the conservation of threatened or endangered species. Empowering FWS "to alter the listing status of segments rewards those States that most actively encourage and promote species recovery within their jurisdictions. On the other hand, continuing to rigidly enforce the Act's stringent protections in the face of such success just because recovery has lagged elsewhere would discourage robust cooperation." *Id.* at 599.

Plaintiffs' argument that a DPS of a listed species may not be delisted because it was never separately listed in the first place was also squarely rejected in *Humane Society*. The Solicitor's Opinion explained that when FWS lists a species, it "impliedly lists any DPSs that are part of a larger species or subspecies listing." Solicitor's Opinion M-37018 at 7. "In practice," the Opinion explained, "FWS lists the largest entity for which the conservation status is the same across its range and does not separately list any included DPSs that have the same

status. If FWS lists an entire species, or a significant portion thereof, as endangered, it may be effectively listing several smaller and otherwise separately-listable entities within the range of that species (subspecies, DPSs, or significant portions of its range)." *Id. Humane Society* expressly adopted that reasoning, holding that "the Service's initial listing of all gray wolves in North America necessarily listed all possible segments and subspecies within that grouping." 865 F.3d at 597. So too here, the 1975 listing of grizzly bears in the lower 48 states included the GYE DPS. Plaintiffs urge this Court to reject the D.C. Circuit's holding in favor of the district court decision that the D.C. Circuit reversed, WEG Brief at 71, but this Court's "presumption is not to create an intercircuit conflict." *Environmental Protection Information Center,* 257 F.3d at 1077.

C. The GYE DPS is a valid DPS.

Plaintiffs argue that FWS may not designate the Greater Yellowstone Ecosystem as a DPS because the lower 48 states are (they say) a DPS, and FWS may not recognize a DPS of a DPS. Given that a DPS is a "species" under the ESA, this point is debatable. More importantly, the point is academic because FWS did not do so here. In accordance with the criteria in FWS's longstanding policy on designating DPSs, FWS found that the GYE grizzly bear was "discrete from other grizzly bear populations and significant to the remainder of the taxon (*i.e., Ursus arctos horribilis*)." 2 E.R. 100. The GYE DPS is a discrete population segment of the taxon of grizzly bears, not of the lower-48 listed entity.

Moreover, Plaintiffs essentially concede that FWS has discretion in how to configure DPSs when they present other possible DPS configurations and that "all of [the configurations] would comply with the ESA." WEG Brief at 68-69. All of Plaintiffs' preferred alternative configurations involve DPSs that, like the GYE DPS, are smaller than and contained within what is now the lower-48 listed entity. What Plaintiffs' maps show is that there are multiple valid ways that DPS boundaries could be drawn, and nothing requires FWS to choose the largest grouping possible.

D. The ESA does not require FWS to consult with itself under Section 7 on delisting decisions.

Plaintiffs briefly argue that FWS "failed to initiate and complete section 7 consultation" with itself to ensure that the GYE delisting decision is "not likely to jeopardize the continued existence" of the remaining listed grizzly bears in the lower 48 states. WEG Brief at 73-76; *see also* 16 U.S.C. § 1536(a). None of the cases cited by Plaintiffs requiring Section 7 consultation, however, involve a listing or delisting decision. No court has ever held that listing or delisting decisions require Section 7 consultation, because Section 4 of the ESA sets forth the *exclusive* factors that may be considered in listing or delisting decisions. If the five factors enumerated in Section 4(a)(1) are satisfied, then FWS must either list or delist the species. 16 U.S.C. § 1533(a)(1). FWS "cannot consider environmental impacts beyond those addressed by the five factors described in section 4(a)," and thus there is no room in the statutory scheme for Section 7 consultation on listing or delisting decisions. 2 E.R. 128 (citing *Pacific Legal*

Foundation v. Andrus, 657 F.2d 829, 836 (6th Cir. 1981)); *accord Douglas County v. Babbitt*, 48 F.3d 1495, 1506-07 (9th Cir. 1995).

Section 4(b) of the ESA likewise requires listing and delisting determinations to be made "*solely* on the basis of the best scientific and commercial data available to [FWS] after conducting a review of the status of the species and after taking into account" state and foreign conservation efforts. 16 U.S.C. § 1533(b)(1)(A) (emphasis added). Congress did not include the result of a Section 7 consultation on the list of factors on which FWS must "solely" base its determination. It would be an odd reading of the statute to hold that after prescribing specific, exclusive criteria and information to be considered in listing and delisting determinations, Congress nonetheless intended FWS to also undertake and factor in an ESA Section 7 consultation. *Department of Revenue of Oregon v. ACF Industries, Inc.,* 510 U.S. 332, 343 (1994) (holding that courts should reject statutory readings that may appear tenable "when viewed in isolation," but turn out to be "untenable in light of [the statute] as a whole").

Plaintiffs' novel argument is also fundamentally at odds with the approach taken by the court below and by the D.C. Circuit in *Humane Society*, both of which held that FWS's delisting decision under Section 4 must take into account any impact on the rest of the listed species but not that Section 7 consultation was required. 1 E.R. 29-30; 665 F.3d at 601. If FWS must consider the impact of delisting on the rest of the listed species in its Section 4 analysis, it would be redundant and incongruous to hold that it must *also* conduct a Section 7 consultation as part of which the same experts would evaluate the same impacts

on the same species. Section 7 consultation would be meaningless in this context, which is doubtless why no court in the 46-year history of the Endangered Species Act has ever required it for a listing or delisting decision. This and Plaintiffs' other alternative legal arguments lack merit.

VI. Cross-Appellant Aland's arguments are meritless.

A. This Court's 2011 decision did not preclude FWS from issuing a future rule delisting the GYE grizzly bear.

Plaintiff/Cross-Appellant Robert Aland contends that FWS is "precluded by non-mutual offensive collateral estoppel from relitigating the validity of removing ESA protection for GYE grizzly bears because delisting was fully considered and decided by the District Court and this Court" in *Greater Yellowstone*. Aland Brief at 35. But "nonmutual offensive collateral estoppel cannot be asserted against the government." *National Medical Enterprises, Inc. v. Sullivan*, 916 F.2d 542, 545 (9th Cir. 1990); *Mendoza*, 464 U.S. at 159–60. Moreover, this Court's decision in *Greater Yellowstone* did not foreclose FWS from ever delisting the GYE grizzly bear; it simply held that FWS had not, in the 2007 rule, adequately justified its conclusion that whitebark pine decline was not a threat. 665 F.3d at 1030. Thus, even if estoppel were available against the government, therefore, it would not apply here.

B. The ESA does not preclude FWS from issuing a delisting decision after the statutory deadline.

Aland is correct that the ESA, 16 U.S.C. § 1533(b)(6), requires FWS to take action on a proposed rule determining the status of a species within 12

months (extendable, but in this case not extended, by six months), and that FWS missed that deadline by 3.5 months. But Aland is incorrect that the Final Rule is void as a result. The "failure of an agency to act within a statutory time frame does not bar subsequent agency action absent a specific indication that Congress intended the time frame to serve as a bar." *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1400 (9th Cir. 1995). In *Idaho Farm Bureau*, this Court held that FWS could issue a listing rule seven years after publishing the proposed rule, explaining that § 1533(b)(6)'s time limits "are designed to be an impetus to act rather than a prohibition on action taken after the time expires." *Id.* at 1401. For the same reason, § 1533(b)(6) does not bar FWS's slightly belated issuance of the Final Rule here.

C. The ESA does not require statistical analysis of comments.

FWS solicited comments on the proposed rule from the public and from "appropriate Federal and State agencies, Tribes, scientific experts and organizations, and other interested parties," and it received more than 665,000 comments. 2 E.R. 127-28. It grouped those comments into 117 topics, and thoroughly and thoughtfully responded to each one across 80 pages of the Final Rule. 2 E.R. 127-206. Aland raises two objections to these responses: first, he protests that FWS did not perform a statistical analysis to determine the pro/con ratio; and second, he assumes that "public sentiment" was "overwhelming in opposition to delisting" and that FWS's decision to delist therefore "cannot be tolerated by this Court." Aland Brief 55-56.

Nothing in the ESA or FWS's regulations requires the statistical analysis demanded by Aland. To the contrary, the ESA explicitly requires that FWS's listing and delisting decisions be made "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). FWS must consider, and did consider, all *information* provided in the notice-and-comment process; however, FWS need not place, and did not place, any weight on the number of comments for and against delisting.

D. The Rule was reviewed by qualified peer reviewers.

FWS policy calls for formal peer review of influential scientific documents, which FWS conducted in accordance with guidelines established by the Office of Management and Budget, 70 Fed. Reg. 2664 (Jan. 14, 2005). Due to the controversial nature of its decision, FWS chose to contract out the peer review rather than selecting the peer reviewers itself. FWS's statement of work to the contractor, Amec Foster Wheeler, set demanding requirements for peer reviewers' qualifications; these included a "Ph.D. or an M.S. (with significant experience) in Wildlife Ecology, Ecology, or Wildlife Management"; "experience working with the management of large carnivores, especially bears"; "Expert knowledge of wildlife biology, wildlife management, demographic management of mammals (especially carnivores)"; and "Experience as a peer reviewer for scientific publications." 3 Aland E.R. 400. FWS also identified conflicts of interest that would disqualify a scientist from serving as a peer reviewer. The contractor then independently selected five peer reviewers who met FWS's criteria. *Id.*

The peer reviewers provided comments on the quality of the information and analyses used in the rule, identified any oversights or omissions, and provided advice on whether uncertainties were clearly identified and judgments were reasonably drawn. *Id.*, 3 E.R. 350-97. The peer reviewers' names and resumes were provided, 3 Aland E.R. 423-530, but their reviews were anonymized to encourage candor. 2 E.R. 129. After receiving the peer reviews, FWS made them available for public comment. 2 E.R. 130.

Aland claims that the peer reviewers—all of whom are Ph.D. wildlife biologists or ecologists—are unqualified, and he asks this Court to exclude their reports from the administrative record. Aland Brief at 63. First of all, as the resumes of the peer reviewers make clear, 3 Aland E.R. 423-530, they are eminently qualified. Second, that is not how record review works. The administrative record consists of the information that FWS considered in making the decision under review, and the peer reviews are therefore necessarily included. If Aland believes that they are erroneous and that FWS erred in considering them, he is free to make that case; moreover, he was free to submit evidence supporting his views into the record during the comment period. But his dissatisfaction with the peer reviewers' credentials or his disagreement with their conclusions does not establish that FWS's consideration of their views renders its decision arbitrary or capricious.

E. The Rule was not tainted by political interference.

Aland argues that the rule was tainted by political interference because various elected officials communicated to FWS their support for delisting and

their opinions about specific measures included in the Conservation Strategy. Contrary to his apparent opinion, however, communication between FWS and the States' elected representatives is not improper, and is insufficient to demonstrate that sound science-based decisionmaking was overcome by political interference. Organizations such as the plaintiffs and intervenor-defendants also regularly communicate their views to FWS, and the record contains more than 80 letters and emails from Mr. Aland himself, both before and after the proposed rule was published in 2016, expressing his views about whether the GYE grizzly bear should be delisted. None of these expressions of opinion taints the final rule absent a showing that those opinions, rather than the best available scientific and commercial data, drove FWS's decision. Aland does not even attempt to make such a showing.

In the rare cases in which courts have rejected agency action as tainted by political interference, there was evidence that the agency succumbed to political pressure by changing its position. *See Earth Island Institute v. Hogarth*, 494 F.3d 757, 769 (9th Cir. 2007) (agency adopted position that it described days earlier as "not supported by the science"); *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739, 745 (W.D. Tex. 1997) (agency withdrew proposed listing that it previously identified as its "top priority in the region for listing"). Here, by contrast, FWS has consistently taken the position for over a decade that the GYE grizzly bear is recovered and should be delisted, and that position is well supported by the best scientific and commercial data available. There is simply no evidence to support Aland's allegation of improper political influence on FWS's decision

here. *Accord Humane Society*, 865 F.3d at 613-14 (rejecting allegation of political interference where record contained no evidence of "manipulation or disregard of material evidence, and no change in the Service's course of action").

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed with respect to its holdings (1) that FWS must conduct a "comprehensive review of the entire listed species" and (2) that FWS did not rationally support its conclusion that the grizzly bears are not threatened by insufficient genetic diversity.

Respectfully submitted,

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s/ Joan M. Pepin
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