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

CROW INDIAN TRIBE, *et al.*, *Plaintiffs*, v. UNITED STATES OF AMERICA, *et al.*, *Defendants*, and STATE OF WYOMING, *et al.*, *Defendant-Intervenors*.	Case No. 9:17-cv-00089-DLC (Consolidated with Case Nos. 9:17-cv-00117-DLC, 9:17-cv-00118-DLC, 9:17-cv-00119-DLC, 9:17-cv-00123-DLC, and 9:18-cv-00016-DLC) **BRIEF IN SUPPORT OF WYOMING FARM BUREAU FEDERATION; WYOMING STOCK GROWERS ASSOCIATION; CHARLES C. PRICE; AND W&M THOMAN RANCHES, LLC's CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGEMENT**

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Defendant-Intervenors Wyoming Farm Bureau Federation ("WyFB"); Wyoming Stock Growers Association ("WSGA"); Charles C. Price; and W&M Thoman Ranches, LLC ("Thomans") (collectively "Ranchers"), respectfully file this Brief in Support of their Cross-Motion for Summary Judgment and Response to Plaintiffs' Motions for Summary Judgment.

INTRODUCTION

For generations, farmers and ranchers have lived on the edges of civilization, regularly interacting with the threatened and endangered species that live in their backyards. In the case of the North American grizzly bear (*Ursus arctos horribilis*), this is especially true. The grizzly bear is not the cuddly teddy bear that so many children grew up with, nor is it the idealized symbol of western wilderness that so many adults seek to experience during their brief exposures to "nature" before returning to their urban lives. In reality, the grizzly bear is an apex predator, capable of slaughtering man and livestock alike, with no more than one vicious swipe of the paw. The ranchers who live and work in and around the Greater Yellowstone Ecosystem ("GYE") area know this all too well. Ranchers such as Charles Price and the Thomans, along with their fellow WyFB and WSGA members, have suffered the devastating effects of the unmanaged and recovered GYE grizzly bear population for years, without any adequate recourse. Ranchers live in fear that the ever-

expanding grizzly bear population will continue to kill livestock and threaten their lives and livelihoods. The recovered GYE grizzly bear population cannot be allowed to continue wreaking havoc on those who live in and around the GYE area while under the umbrella of federal protection, unchecked by the U.S. Fish and Wildlife Service ("FWS").

The matter before this Court provides a clear, albeit unusual, example of the Endangered Species Act, 16 U.S.C. § 1531 *et seq*. ("ESA"), accomplishing its stated purpose. The grizzly bear was prominent throughout the western United States prior to westward expansion and settlement. *Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears from the Federal List of Endangered and Threatened Wildlife*, 82 Fed. Reg. 30,502, 30,508 (June 30, 2017) ("2017 Final Rule"). By the 1930s, grizzly bears were reduced to less than two percent of their former range, and their numbers dwindled significantly. *Id*. In 1975, in response to the declining population, FWS designated the grizzly bear as a threatened species under the ESA. *Amendment Listing the Grizzly Bear of the 48 Conterminous States as a Threatened Species*, 40 Fed. Reg. 31,734 (July 28, 1975) ("1975 Rule"). By 2017, over 40 years later, the grizzly bear in the GYE area had recovered, meeting and exceeding the recovery goals established by FWS through its extensive monitoring process. *See* 2017 Final Rule, 82 Fed. Reg. 30,502. FWS, following the best available science and the clear intent of the ESA, published its 131-page final

rule and final recovery plan on June 30, 2017, wherein it designated the GYE grizzly bear as a distinct population segment ("DPS") and simultaneously removed the GYE grizzly bear DPS from the List of Endangered and Threatened Wildlife. 2017 Final Rule, 82 Fed. Reg. 30,502. The 2017 Final Rule returned management and oversight of the recovered GYE grizzly bear DPS to the various states, retaining some limited federal oversight. *See id.* Plaintiffs are attempting to delay and halt FWS's actions, thereby frustrating the entire purpose of the ESA, essentially arguing for permanent federal management of a recovered species.

This Court has the rare opportunity to uphold the original purpose of the ESA and allow management of a recovered species to return to the various states. By doing so, the Court would help those most affected by the GYE grizzly bear DPS receive efficient and localized management of one of the country's most dangerous predators.

BACKGROUND

In 1975, FWS designated the grizzly bear as a threatened species under the ESA. 1975 Rule, 40 Fed. Reg. 31,734. In 1982, FWS issued the original Grizzly Bear Recovery Plan, identifying six recovery ecosystems within the conterminous United States. FWS_LIT:14322, 14360 (1982 Recovery Plan). The FWS designation and original recovery plan were promulgated prior to FWS's February

1996 adoption of a DPS policy.[1] In 2007, FWS published a final rule identifying the GYE grizzly bear population as a DPS and simultaneously removing it from the List of Endangered and Threatened Wildlife. *Final Rule Designating the Greater Yellowstone Area Population of Grizzly Bears as a Distinct Population Segment; Removing the Yellowstone Distinct Population Segment of Grizzly Bears from the Federal List of Endangered and Threatened Wildlife; 90-Day Finding on a Petition to List as Endangered the Yellowstone Distinct Population Segment of Grizzly Bears*, 72 Fed. Reg. 14,866 (Mar. 29, 2007) ("2007 Rule"). The 2007 Final Rule was challenged. The Ninth Circuit vacated the rule and remanded for more thorough research as to whether the loss of whitebark pine was a threat to the GYE grizzly bear population. *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1032 (9th Cir. 2011).

FWS established three demographic criteria to objectively measure and monitor recovery: (1) minimum population size, (2) distribution of reproductive females, and (3) "annual human-caused mortality limits that would allow the population to achieve and sustain recovery." 2017 Final Rule, 82 Fed. Reg. 30,512.

[1] The ESA does not define "distinct population segment," but FWS's adopted policy defines a DPS as a "discrete" and "significant" segment of the overall population. *Policy Regarding the Recognition of Distinct Vertebrae Population Segments Under the Endangered Species Act*, 61 Fed. Reg. 4,722, 4,725 (Feb. 7, 1996) ("DPS Policy").

In 2013, FWS published a draft Grizzly Bear Recovery Plan that proposed updating "demographic recovery criterion 1 [minimum population size] to maintain a minimum population of 500 animals and at least 48 females with cubs-of-the-year." 2017 Final Rule, 82 Fed. Reg. 30,512; s*ee Draft Revised Supplement to the Grizzly Bear Recovery Plan*, 78 Fed. Reg. 17,708 (Mar. 22, 2013). In its 2015 report, released in 2016, the Interagency Grizzly Bear Study Team ("IGBST") estimated the population of the GYE grizzly bear to be approximately 717 bears, including 51 females with cubs. F. T. van Manen & M. A. Haroldson, *Introduction*, *in* YELLOWSTONE GRIZZLY BEAR INVESTIGATIONS: ANNUAL REPORT OF THE INTERAGENCY GRIZZLY BEAR STUDY TEAM, 2015, 1, 1-4 (F. T. van Manen, M. A. Haroldson, & B.E. Karabensh, eds., 2016).[2] The IGBST concluded that "the population may be nearing carrying capacity in some portions of the ecosystem . . .." *Id*. In 2016, based on the established monitoring criteria, IGBST's consistently reported population numbers, and additional, extensive research on the effect of the loss of whitebark pine on the GYE area grizzly bear, FWS proposed a rule identifying the GYE population of grizzly bears as a DPS and removing the bear from the List of Endangered and Threatened Wildlife. *Removing the Greater*

[2] IGBST's Annual Reports are available at https://www.usgs.gov/centers/norock/science/igbst-annual-reports?qt-science_center_objects=0#qt-science_center_objects.

Yellowstone Ecosystem Population of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife, 81 Fed. Reg. 13,173 (Mar. 11, 2016) ("2016 Proposed Rule"). The 2016 Proposed Rule also solicited comments on FWS's draft supplement to the Grizzly Bear Recovery Plan ("2016 Recovery Plan") and a long-term conservation strategy for the delisted DPS ("2016 Conservation Plan"). *See id*. at 13,174. FWS published its 131-page final rule and final recovery plan on June 30, 2017.[3] 2017 Final Rule, 82 Fed. Reg. 30,502.

Beginning in June 2017, a number of environmental organizations, Indian tribes, and individuals filed the instant actions to challenge the 2017 Final Rule (collectively "Plaintiffs"). On June 30, 2017, the Crow Indian Tribe, amongst others,[4] filed a *Complaint and Petition for Permanent Injunction and Declaratory Relief*, initiating the instant case, and, on September 8, 2017, filed a *First Amended Complaint and Petition for Permanent Injunction and Declaratory Relief* ("Crow

[3] The final recovery plan is available at https://www.fws.gov/mountain-prairie/es/species/mammals/grizzly/GYE_RP_Supplement_2017_final.pdf.

[4] The other Plaintiffs in Case No. 9:17-cv-00089-DLC are Crow Creek Sioux Tribe, Standing Rock Sioux Tribe, Lower Brule Sioux Tribe, Ponca Tribe of Nebraska, Piikani Nation, the Crazy Dog Society, Hopi Nation Bear Clan, Northern Arapaho Elders Society, David Bearshield, Kenny Bowekaty, Llevando Fisher, Elise Ground, Arvol Looking Horse, Travis Plaited Hair, Jimmy St. Goddard, Pete Standing Alone, Nolan Yellow Kidney, and Gary Dorr.

Indian Tribe Complaint"). Case No. 9:17-cv-00089-DLC, ECF Nos. 1, 22.[5] The Crow Indian Tribe alleges, *inter alia*, that the 2017 Final Rule violates the ESA and that Defendants failed to comply with the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*. ("APA"), in promulgating the rule. ECF No. 22, ¶¶ 113–91.

After the Crow Indian Tribe filed its complaint, five other complaints were filed by various parties, all challenging the 2017 Final Rule and all involving common questions of law and fact. *See* ECF No. 40, 120. All Plaintiffs request that this Court grant relief in the form of an Order: (1) declaring that the 2017 Final Rule violates the ESA and/or APA, and (2) vacating, and/or permanently enjoining enforcement of the 2017 Final Rule. *See* Crow Indian Tribe Complaint, at 42–43; Humane Society Complaint, at 43; WildEarth Complaint, at 46; N. Cheyenne Tribe Complaint, at 41–42; Wild Rockies Complaint, at 23; Aland Complaint, at 75.

On May 14, 2018, this Court entered an Order setting forth a schedule for dispositive briefing in this matter. ECF No. 178, at 2–3. Pursuant to that schedule, each of the Plaintiffs filed a Motion for Summary Judgment by June 13, 2018. *See* ECF Nos. 182, 185, 188, 189, 191, 193. The Federal Defendants filed their Cross-Motion for Summary Judgment and Response to Plaintiffs' Motions to Dismiss on

[5] Hereinafter, unless otherwise specified, citations to court filings will be based upon the electronic docket contained within this Court's CM/ECF database for the lead case, i.e. Case No. 9:17-cv-00089-DLC.

July 11, 2018. ECF No. 202. Defendant-Intervenors are required to file any cross-motions for summary judgment or responses to Plaintiffs' motions for summary judgment by July 25, 2018. ECF No. 178, at 3.

STANDARD OF REVIEW

Challenges to an agency's actions under the ESA are reviewed under and governed by the APA. *Greater Yellowstone Coal.*, 665 F.3d at 1023. A Court may review an agency action and set aside any agency action found to be "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

ARGUMENT

As stated in their Cross-Motion for Summary Judgment, filed concurrently herewith, the Ranchers affirmatively oppose each and every claim for relief set forth in Plaintiffs' respective motions for summary judgment filed in the six, above-captioned, consolidated cases. Ranchers, however, intend to focus their argument on the areas that most clearly establish the basic flaws in Plaintiffs' reasoning, and those areas with which Ranchers have been forced to become intimately familiar, given their close and repeated interactions with the effects of the ESA.

I. THE GREATER YELLOWSTONE ECOSYSTEM GRIZZLY BEAR IS A RECOVERED SPECIES AND SHOULD BE RETURNED TO STATE-LEVEL MANAGEMENT

It is clear that the GYE grizzly bear population is recovered. As the Federal Defendants establish in Section II of their *Memorandum in Support of Federal Defendants' Cross Motion for Summary Judgment and Opposition to Plaintiffs' Motions for Summary Judgment*, the GYE grizzly bear population has increased since the 1970s, now occupies nearly all of the GYE area's suitable habitat, and shows no signs of becoming threatened or endangered within even the distant future. ECF No. 203, at 49–56. Beyond the specific analysis conducted by Federal Defendants, this Court should also take into account the original intent of the ESA, and the effect of the Plaintiffs' suits in obscuring that original intent. By forcing the federal government to keep the GYE grizzly bear listed as a threatened species, Plaintiffs are requiring the federal government to retain jurisdiction over management of the GYE grizzly bear, a recovered species, in direct contravention of the intent of the ESA.

A. The Original Intent of the Endangered Species Act was to Aid in the Recovery of Species and Return Management to the State

The clear intent behind the ESA is to identify threatened or endangered species, aid in their recovery, and then return management of the species back to the various States. 16 U.S.C. § 1532(3); *see also* H.R. Conf. Rep. 93-740 § 3 ("[T]he

term [conservation and management] was redefined to include generally the kinds of activities that might be engaged in to improve the status of endangered and threatened species so that *they would no longer require special treatment*." (emphasis added)). The plain text of the ESA seeks to "encourag[e] the States . . ., though Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards." 16 U.S.C. § 1531(a)(5).

Plaintiffs, however, seek to force the federal government to retain management control over the GYE grizzly bear population, even after it has recovered, by invalidating the 2017 Final Rule. Listing a species as threatened or endangered was never intended to be permanent, but rather was intended to be a temporary designation. *See* 16 U.S.C. §§ 1531, 1532. The temporary designation allows FWS to financially and structurally assist with the recovery of a threatened or endangered species and then allows the States to regain control of the species within their respective jurisdictions. *See id.*

Continued federal management of a recovered species is not only inappropriate under the plain language of the ESA, but also violates the sovereign jurisdiction of the states to control the affairs within their borders. *See* U.S. CONST., Amend. X ("The powers not delegated to the United States by the Constitution, nor

prohibited by it to the States, are reserved to the States respectively, or to the people."). Management of a recovered species exceeds the authority Congress delegated to FWS by express language in the ESA. 16 U.S.C. §1533(a)(1)(B). Once a species is recovered, it is the duty of FWS to remove that species from the List of Endangered and Threatened Wildlife. If this Court were to vacate the 2017 Final Rule, it would be overriding the will of Congress and the people, as well as forcing FWS to retain jurisdiction over an animal without any congressionally-delegated authority to do so.

B. The GYE Grizzly Bear Has Exceeded the Established Recovery Thresholds and is no Longer Threatened

In an effort to comply with this Court's Order, ECF No. 178, and not duplicate arguments, Ranchers incorporate by reference, as if fully set forth herein, Federal Defendants' argument establishing the recovery of the GYE grizzly bear DPS. ECF No. 203, at 49–56.

Most importantly, population viability analyses project that the GYE grizzly bear population has only a one percent (1%) chance of going extinct within the next 100 years and a four percent (4%) chance of going extinct within the next 500 years. 2017 Final Rule, 82 Fed. Reg 30,508. Based on this fact alone, it is clear that there is no significant threat or danger of the GYE grizzly bear population going extinct within the near or distant future. *See* 16 U.S.C. § 1533.

Additionally, Plaintiffs' arguments that the GYE grizzly bear DPS is not recovered operate as an exercise in Plaintiffs highlighting their own public comments, scientific articles, and population criteria/estimates, as opposed to actually establishing that FWS's determination was arbitrary and capricious. *See, e.g.*, ECF 186, at 24–25 (Plaintiff WildEarth relying on the classification of the Internal Union for Conservation of Nature for the GYE grizzly bear population). Plaintiffs routinely cite comments that they submitted to FWS during the rulemaking process and the science Plaintiffs relied upon when crafting those comments. The fact that Plaintiffs asserted their positions in their public comments does not make them more persuasive than the nearly twenty years of research FWS engaged in when analyzing the GYE grizzly bear DPS. This Court should not be duped by Plaintiffs' effort to take a second bite at the apple in forcing FWS to consider facts and science that were already presented to FWS during the extensive rulemaking process.

C. Plaintiffs Advance a Number of Irrelevant and Disingenuous Arguments that FWS is not Required to Consider

Plaintiffs make a number of disingenuous arguments (some of which are directly contrary to positions they have taken in other ESA contexts) in an attempt to distract the Court from the true basis of their position—continued federal management of a recovered species. In order to petition to list species as endangered

or threatened under the ESA, Plaintiffs routinely use estimates of population numbers as the basis for the need for listing. Yet, here, Plaintiffs argue that population estimates are not sufficient, simply because it does not support their position. According to Plaintiff Aland, a minimum numerical threshold can only be established "by starting with an actual count of the GYE grizzly bear population, which the Federal Defendants did not do." ECF No. 183, at 25–26. Essentially, Aland argues that the only way to establish a minimum numerical threshold is to go out into the GYE area and physically count every grizzly bear present. Not only is Aland's position disingenuous, it is an impossible task, and would preclude the delisting of any species due to inability to physically count their numbers.

Additionally, Plaintiff WildEarth argues that FWS's plan to potentially artificially relocate grizzly bears into the GYE area "does not equal recovery." ECF No. 186, at 27–28. "Recovery under the ESA occurs in the wild and without human interaction." *Id.* Ironically, and contrary to their argument asserted to this Court, Plaintiffs, including WildEarth, fervently support the human-led reintroduction of gray and Mexican Wolves to the Rocky Mountains and the Southeastern U.S., respectively. *See, e.g.,* WildEarth Guardians, Wolf Conservation Program, *available at* http://www.wildearthguardians.org/site/PageServer?pagename= priorities_wildlife_ wolves#. W1dJE0gvy70 (last accessed July 24, 2018); *see also* EarthJustice, Gray Wolves in the Northern Rockies, available at

https://earthjustice.org/our_work/cases/2009/gray-wolves-in-the-northern-rockies (last accessed July 24, 2018). Plaintiffs make disingenuous arguments to this Court in order to force the federal government to retain control of the GYE area grizzly bear.

Plaintiff Aland also asserts that, since the GYE area has not reached carrying capacity, FWS cannot delist the GYE grizzly bear DPS. ECF 183, 27–28. This is an extraneous argument and has never been a requirement of delisting. *See* 2017 Final Rule, 82 Fed. Reg. 30,558. Even if it were, the 2017 Final Rule establishes that the GYE grizzly bear DPS "currently occup[ies] about 92 percent of [its] suitable habitat (42,189 km^2 (16, 286 mi^2))." 2017 Final Rule, 82 Fed. Reg. 30,511 (citations omitted). Additionally, the IGBST, the team tasked with monitoring the GYE grizzly bear population, has concluded that "the population may be nearing carrying capacity in some portions of the ecosystem . . . ." Manen & Haroldson, at 1–4.

Plaintiffs' goal in this case is not to seek review of FWS's 2017 Final Rule to determine if it is arbitrary and capricious. Plaintiffs' actual goal is to distract this Court with emotional appeals and disingenuous arguments to inevitably force FWS to retain management of a recovered species, in direct contravention of the ESA, and to require FWS to undertake another extensive and costly scientific analysis to propose a new delisting rule in the distant future.

II. THE D.C. CIRCUIT'S FACTUAL HOLDINGS IN *HUMANE SOCIETY* ARE NOT BINDING UPON FWS OR THIS COURT

Plaintiffs rely heavily on the D.C. Circuit's ruling in *Humane Society v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017) ("*Humane Society*"). Plaintiffs attempt to analogize the facts of *Humane Society* and the matter before this Court to impose additional restrictions on FWS whenever it seeks to delist a species or DPS. Plaintiffs' arguments, however, fail to acknowledge the clear distinction in the D.C. Circuit's opinion between the widely-applicable *statutory analysis* of the ESA and FWS's DPS Policy, and the *factual analysis* undertaken when determining what FWS must examine in conjunction with a species' "range" and any remnant population after delisting a DPS.

In *Humane Society*, FWS designated a DPS and delisted that DPS under the rulemaking process. The case was one of many examples of the FWS's efforts to distinguish between separate gray wolf populations and to delist the recovered portions. *See, e.g.*, *Humane Society of the United States v. Jewell*, 76 F.Supp.3d 69 (D.D.C. 2014). In 2011, FWS issued a rule that designated the gray wolf population across a number of states as the "Western Great Lakes Distinct Population Segment." *Revising the Listing of the Grey [sic] Wolf (*Canis lupus*) in the Western Great Lakes*, 76 Fed. Reg. 81,666, 81,670 (Dec. 28, 2011) ("2011 Wolf Rule"). In the same rule, FWS delisted the Western Great Lakes DPS. *Id*. The Humane Society

brought suit alleging that the 2011 Wolf Rule violated the ESA and APA. *Humane Society*, 865 F.3d at 594. The court upheld FWS's ability to designate a DPS of a listed species and then delist that DPS, as well as FWS's ability to interpret "range" as the current range of the species and not the historic range. *Id*. at 600, 605. The Court determined based on the facts of the case, however, that FWS's failure to address the remnant population outside of the DPS was arbitrary and capricious, as was FWS's failure to consider the loss of the historic range on the DPS. *Id.* at 604, 607.

Not only are the fact-based holdings of *Humane Society* easily distinguishable from the facts of this case, this Court need not follow the D.C. Circuit down the factual and proverbial rabbit hole of analyzing the remnant population and historic range. In addition to the arguments set forth by Federal Defendants, ECF No. 203, at 7–48, this Court should decline to extend the holdings of *Humane Society* to this case, and the Ninth Circuit, that rely specifically on the factual inquiries made by the D.C. Circuit and not on plain, statutory interpretation.

A. FWS is not Required to Examine the Remnant Population when Designating and Delisting a DPS

The decision in *Humane Society* is not binding on FWS when addressing the specific factual circumstances surrounding the designation and delisting of a DPS. In addressing the clear and unambiguous language of the ESA, the D.C. Circuit made

clear that the ESA allows FWS to designate a DPS of a listed species and delist that DPS. *Humane Society*, 865 F.3d at 600. The D.C. Circuit's analysis is straight-forward statutory interpretation—"[FWS's] interpretation of Section 1533(c)(1) as allowing for the designation of a [DPS] within a listed species is a reasonable reading of the statutory text and . . . does not contravene the purposes of the [ESA]." *Id.* at 597. Such clear interpretation of the ESA can easily be relied upon by FWS in future delisting actions and should be followed by this Court. By interpreting the plain language of the ESA and FWS's DPS policy, the D.C. Circuit did not engage in a factual analysis of the case at hand, but rather established an overarching rule that this Court should follow.

The additional requirement, however, forcing FWS to engage in a factual analysis of the effect on the remnant population is a case-by-case inquiry that neither FWS nor this Court are required to employ in every delisting decision. When engaging in its analysis of the FWS's consideration of the remnant wolf population, the D.C. Circuit does not engage in simple statutory analysis, but rather intertwines the specific factual scenario presented in the case—"Holding that [FWS] has the legal authority to identify a [DPS] from within an already-listed species does not mean it did so properly here." *Id.* at 600. The court's treatment of the statutory language is colored by FWS's long history with the grey wolf and past failed DPS designations. *See id.* at 601.

If this Court were to extend this portion of the D.C. Circuit's ruling to the Ninth Circuit, it would require FWS to engage in a factual analysis that is not required by the plain language of the ESA or FWS's DPS policy. Nowhere does the ESA specifically require FWS to consider the effect of delisting one population upon a distinct and separate population. Plaintiffs admit that the statutory requirement states that FWS can designate a DPS if the segment is "discrete," meaning it is "markedly separated from other populations of the same taxon," and "significant." DPS Policy, 61 Fed. Reg. 4,725; *See* N. Cheyenne MSJ, ECF No 190, at 14. The D.C. Circuit, however, fails to consider the effect of designating a DPS of a species that has always been managed as separate, distinct populations, such as the GYE grizzly bear population.

All of the "factors" the D.C. Circuit relies upon to examine the effect on the remnant population of the gray wolf are already inherent in the treatment of the six separate recovery ecosystems of the grizzly bear and as such do not need to be separately analyzed. *See* FWS_LIT:14322, 14360 (1982 Recovery Plan). Requiring FWS to engage in an additional factual analysis of the effect on the remnant population in every circumstance would frustrate FWS's efforts, in cases such as this, where that analysis is unnecessary by virtue of the factual scenario before the Court. This Court should decline to delve into that factual inquiry in the present case.

B. FWS is not Required to Examine the Loss of Historic Range when Delisting a DPS

The D.C. Circuit successfully engaged in a straight-forward statutory analysis when determining that FWS could define "range" as a species' current range, and not the species' historic range. *Humane Society*, 865 F.3d at 603. The D.C. Circuit analyzed the use of present tense when referring to species recovery as well as whether the understanding of "range" as "current range" was consistent with the purposes of the ESA. *Id.* In so doing, the D.C. Circuit determined that FWS's "interpretation of 'range' to focus on a species' current range is a reasonable interpretation of the [ESA]." *Id.* at 605.

When the D.C. Circuit turned its attention to analyzing the factual circumstances of the case before it, the court did not engage in a pure statutory analysis, but instead looked to "[FWS's] application of the statute to the record at hand." *Id.* at 605. The D.C. Circuit colors its interpretation with the facts of the gray wolf delisting—"failure to address 'an important aspect of the problem' that is factually substantiated in the record is unreasoned, arbitrary, and capricious decision making." *Id*. at 606.

If this Court were to extend the D.C. Circuit's requirement so that FWS must *always* examine the loss of the historic range when delisting a species or DPS, it would impose an unnecessary and unsubstantiated factual inquiry upon FWS when

engaging in the delisting analysis. Again, there is no statutory requirement in the ESA for FWS to examine the effect of any loss of historic range on a species when delisting. Simply because the record in *Humane Society* indicated the loss of the historic range was an important analysis, does not mean this Court must impose that condition on all delisting actions, including the one at hand. Furthermore, given that the GYE grizzly bear DPS has always been treated as a separate recovery ecosystem apart from the total range of the grizzly bear in the United States, forcing FWS to analyze the historic range in this matter would be an exercise in futility.

C. The Factual Holdings in *Humane Society v. Zinke* Frustrate the Intent of the Endangered Species Act in Returning Management of Recovered Species to the Various States

The factual holdings in *Humane Society*, in general, frustrate the purpose of the ESA in returning management of recovered species to the states where they reside. In order to effectuate its intended purpose, the ESA takes the management of endangered species out of the hands of the state and places their continued success in the hands of the federal government. *See* 16 U.S.C. § 1531, *et seq*. Once a species has met its recovery goals and FWS has determined—through the best available science—there is not a foreseeable threat of extinction, then the species must be delisted and its management returned to the state. *See id.* If this Court follows Plaintiffs' arguments, then the delisting of a recovered species will be contingent on the management of another state's population. "Because the locations of [DPSs] not

uncommonly correspond with geographical lines, empowering [FWS] to alter the listing status of segments rewards those States that most actively encourage and promote species recovery within their jurisdictions." *Humane Society*, 865 F.3d at 598. In fact, the ESA's requirement that FWS evaluate subspecies and segments, in addition to species, "signals Congress's intent to target the [ESA'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.* If this Court applies the factual conditions regarding historic range and remnant population from *Humane Society* in this matter, it will undermine the intent of the ESA in targeting the ESA's provisions where needed.

Overall, the *Humane Society* opinion was issued by a D.C. Circuit court dealing with specific issues of fact. The findings made in Washington D.C. vary widely from the knowledge that this Court possesses regarding the GYE grizzly bear and the GYE area generally. Fortunately, this Court is not obligated to follow the factual findings of a court that is not within this Court's circuit. In this case, this Court should not take the factual "holdings" from *Humane Society* and apply them to the delisting of the GYE grizzly bear. This Court has the ability to fully promote the intended purpose of the ESA and allow for the federal government to complete its duty in returning management of the GYE grizzly bear population to the various states.

III. ALTERNATIVELY, FWS APPROPRIATELY ANALYZED THE HISTORIC RANGE AND THE REMNANT POPULATION OF THE GYE GRIZZLY BEAR DPS

Even if this Court chooses to apply the fact-based "holdings" from *Humane Society*, the 2017 Final Rule appropriately analyzed the historic range and remnant population of the GYE grizzly bear population.

A. FWS Properly Considered the Historic Range of the GYE Grizzly Bear DPS

Although not formally classified as a DPS, the grizzly bear has been divided and managed as six distinct populations dating back to FWS's 1982 Recovery Plan. FWS_LIT:14322, 14360 (1982 Recovery Plan). FWS identified and documented the discreteness between the GYE grizzly bear DPS and other grizzly bear populations located in the six designated ecosystems. 2017 Final Rule, 82 Fed. Reg. 30,517. By establishing that the GYE grizzly bear population was a discrete population, FWS inherently considered the fact that the population was located in a particular ecosystem separate and apart from other geographical areas that may or may not be able to sustain the population. In the context of the GYE grizzly bear, the historic range analysis has occurred and been ongoing since the species was treated as a separate recovery ecosystem in 1982.

In their brief for summary judgment, Plaintiff Wild Rockies inaccurately assert that FWS: (1) "failed to review or consider lost historic range of the grizzly

bear," ECF 191-1, at 6; (2) ignored the "extreme loss of the grizzly bear's historic range," *Id.* at 10; and (3) did not include consideration of major geographical areas in which the grizzly bear was once viable but no longer is, *Id.* at 10–11.

In truth, through the best available science, FWS determined that portions of the historical range of the lower-48 grizzly were no longer a suitable habitat for the GYE grizzly bear. 2017 Final Rule, 82 Fed. Reg. 30,510, 30, 551. FWS considered three factors when distinguishing between suitable and unsuitable habitat: "(1) Being of adequate habitat quality and quantity to support grizzly bear reproduction and survival; (2) being contiguous with the current distribution of GYE grizzly bears such that natural recolonization is possible; and (3) having low mortality risk as indicated through reasonable and manageable levels of grizzly bear mortality." *Id.* at 30,510. FWS relied on a number of well-founded scientific articles to establish these factors and to establish the reasonable suitable habitat range for the GYE grizzly bear DPS. *See id.* Additionally, FWS specifically addressed the historic range of the GYE grizzly DPS, establishing that "[a]lthough there are historical records of grizzly bears throughout the GYE DPS, evidence suggests that grizzly bears were less common in prairie habitats." *Id.* It is clear that FWS considered the loss of any additional range, including the historic range, on the GYE grizzly bear DPS when it established the suitable and non-suitable habitat for the GYE grizzly bear DPS. It would be nonsensical to require FWS to examine the loss of non-

suitable habitat on the GYE grizzly bear DPS, when, by definition, that habitat cannot support a grizzly bear population.

Plaintiff Wild Rockies asserts that by "carving up the conterminous range of the grizzly bear into smaller pieces, [FWS's] Final Rule creates gaps in the range of grizzly bears that share a common boundary in the 48 conterminous States," ECF 191-1, at 6, and accuses FWS of making an error in analyzing the grizzly bear's historical range because there is only evidence regarding "whether a species in its current range inside the [GYE DPS] is likely to become endangered in the foreseeable future," *Id.* at 11.

Wild Rockies fails to acknowledge that FWS is not "carving up" the range of the grizzly bear but instead has monitored and treated the six grizzly bear ecosystems as separate and distinct since 1982. *See* FWS_LIT:14322, 14360 (1982 Recovery Plan). In addition, certain areas, while considered part of the historical range, have not consistently been a suitable habitat for grizzly bear populations. These peripheral areas, including prairie habitats, historically have not been able to support a grizzly bear population, and were therefore not considered lost viable habitat. 2017 Final Rule, 82 Fed. Reg. 30,510, 30,551. The historic range of the grizzly bear also includes major modern metropolitan areas such as Los Angeles and San Francisco. Unless Plaintiffs would have FWS establish a grizzly bear population inside Dodger Stadium or Candlestick Park, there is no plausible reason to require FWS to

specifically address the entirety of the historic range, when FWS has already established the suitable habitat for the GYE grizzly bear DPS.

The "phenomenon in which the quantity and quality of sustainable habitat is diminished because of interactions with surrounding less suitable habitat is known as the edge effect." 2017 Final Rule, 82 Fed. Reg. 30,511. The edge effect is exacerbated through habitat areas being in close proximity to uninhabitable areas, major conflict areas that put grizzly bears' lives at risk, and areas where human development or industry prevent grizzly bears from occupying surrounding areas. *Id.* at 30,511. After conducting extensive research on viable habitat, as clearly set forth in the 2017 Final Rule, FWS concluded the GYE area was the only viable habitat able to sustain the GYE grizzly bear DPS. *See, e.g.*, *id.* at 30,509–12. FWS further concluded that despite the loss of historical range, the area within the GYE DPS boundaries "is sufficient to meet all the habitat needs of a recovered grizzly bear population." *Id.* at 30,511. This is highlighted by the fact that the GYE grizzly bear "currently occup[ies] about 92 percent of that suitable habitat (42,189 km^2 (16, 286 mi^2))." *Id.* (citations omitted).

B. FWS Properly Considered the Effect of the Delisting of the GYE grizzly bear DPS on the Remnant Population

The GYE grizzly bear population is a discrete DPS that does not affect outside grizzly bear populations located in other protected ecosystems. 2017 Final Rule, 82

Fed. Reg. 30,517–18. "The 1993 Recovery Plan states that [the six] 'grizzly bear populations may be listed, recovered, and delisted separately,' and that is the intent of [FWS] to delist individual populations as they achieve recovery." *Id.* at 30,517 (citations omitted). Of the six distinct grizzly bear populations, one is recovered, which demonstrates the success of the ESA in assisting in the recovery of a discrete population of grizzly bear. Once the ESA has been successful, there is no reason for a recovered population to continue to be listed as threatened or endangered. *See* 16 U.S.C. § 1533. There is no reason for a recovered DPS to remain listed, especially when there is no interaction between the recovered population and other non-recovered populations.

Plaintiff Wild Rockies contends that FWS did not consider "the impacts of delisting the GYE grizzly bears on the remnant population," and attempts to bolster its argument through FWS's comment that "consideration and analyses of grizzly bear populations elsewhere in the lower 48 states is outside the scope of this rulemaking." ECF 191-1, at 14 (citation omitted).

First and foremost, in the 2017 Final Rule, based on the best scientific and commercial data available, FWS states "the GYE grizzly bear population is discrete from other grizzly bear populations and [is] significant to the remainder of the taxon . . . due to its persistence in an ecological setting unique for the taxon and because the loss of this population would result in a significant gap in the range of the taxon."

2017 Final Rule, 82 Fed. Reg. 30,519. Under this finding, the GYE grizzly bear population is both discrete and significant, which meets the definition of a DPS under the ESA. *Id.* at 30,517–19.

Based on its discreteness and physical isolation, FWS found that the GYE grizzly bear DPS has no impact upon and is not impacted by the other grizzly bear populations in any way that would affect long-term survival. *Id.* "The GYE grizzly bear population is the southernmost population remaining in the conterminous United States and have been physically separated from other areas where grizzly bears occur for at least 100 years." *Id.* at 30,518. Not only that, but the nearest population is 70 miles to the north. *Id*. If the GYE grizzly bear population has been isolated in the GYE area for 100 years, and yet has significantly recovered its population numbers since the 1970s, it is clear that the GYE area is capable of sustaining the local population of grizzly bear and has no interaction with the surrounding populations. By the mere fact that FWS has consistently treated the GYE area ecosystem as distinct and that there has not been any interaction between the other ecosystems over the past 100 years, it is clear that delisting the GYE DPS will have no distinguishable effect on the remnant population.

CONCLUSION

This Court should not be distracted by Plaintiffs' histrionics when it comes to delisting the GYE grizzly bear population. This Court should uphold the original intent of the ESA and allow management of the recovered GYE grizzly bear population to return to the various States. This Court should also decline to descend into a factual rabbit-hole by forcing FWS to analyze the historic range and remnant population in every delisting action. Even if the Court were to do so here, the 2017 Final Rule sufficiently considered the required elements.

DATED this 25th day of July 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief in Support contains 6,475 words, excluding the parts of the brief exempted by rule. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point font.

DATED this 25th day of July 2018.

/s/ Cody J. Wisniewski
Cody J. Wisniewski
MOUNTAIN STATES LEGAL FOUNDATION

CERTIFICATE OF SERVICE

I hereby certify on July 25, 2018, I filed the forgoing document with the Clerk of the Court using this Court's CM/ECF system, which will send notification to all counsel of record pursuant to Fed. R. Civ. P. 5 and D. Mont. L.R. 1.4(c)(2).

In addition, I hereby certify that, on July 25, 2018, the foregoing document was served to Robert H. Aland, pro se Plaintiff, via electronic mail at rhaland@comcast.net. Plaintiff Aland consented, in writing, to service via electronic mail, pursuant to Fed. R. Civ. P. 5(b)(2)(E). See Case No. 9:18-cv-00016-DLC, ECF No. 40.

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