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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)

REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT OF WYOMING FARM BUREAU FEDERATION; WYOMING STOCK GROWERS ASSOCIATION; CHARLES C. PRICE; AND W&M THOMAN RANCHES, LLC

Wyoming Farm Bureau Federation; Wyoming Stock Growers Association; Charles C. Price; and W&M Thoman Ranches, LLC (collectively "Ranchers"), by and through their undersigned counsel, Mountain States Legal Foundation, by Cody J. Wisniewski, and local counsel, Crowley Fleck PLLP, by Steven P. Ruffatto and Joshua B. Cook, respectfully file this Reply in Support of their Cross-Motion for Summary Judgment. *See* Case No. 17-cv-00089-DLC, ECF No. 208.[1]

ARGUMENT

Ranchers reiterate their opposition to each and every claim for relief set forth by Plaintiffs in their respective motions for summary judgment, filed in the six, consolidated, above-captioned cases. *See* ECF Nos. 182, 185, 188, 189, 191, 193. In order to promote judicial efficiency and to comply with this Court's Order dated May 14, 2018, ECF No. 178, Ranchers will only briefly raise three issues in reply to Plaintiffs' responses to the Federal-Defendants' and Defendant-Intervenors' cross-motions for summary judgment. *See* ECF Nos. 224, 226, 227, 230, 231.[2]

[1] Hereinafter, each citation to the Court's electronic record in this Reply refers to the electronic record maintained for Case No. 17-cv-00089-DLC, unless otherwise specified. For clarity's sake, only the electronic record for the lead case will be cited, unless there is a relevant disparity among the records.

[2] Plaintiffs in Case No. 17-cv-00089-DLC, Crow Indian Tribe, *et al*., did not file a response to Federal Defendants' or Defendant-Intervenors' respective Cross-Motions for Summary Judgment.

I. PLAINTIFFS HAVE FAILED TO ADDRESS RANCHERS' ARGUMENTS DISTINGUISHING *HUMANE SOCIETY V. ZINKE* OR TO OTHERWISE SUPPORT PLAINTIFFS' RELIANCE ON *HUMANE SOCIETY V. ZINKE*

Notably, Plaintiffs all utterly fail to address Ranchers' argument as to why the D.C. Circuit's ruling in *Humane Society v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017) ("*Humane Society*") is not binding upon the U.S. Fish & Wildlife Service ("FWS") or this Court, despite Plaintiffs' intransigent reliance upon the case. *See* ECF No. 209, at 21–27. There is a clear distinction outlined in the *Humane Society* opinion between the court's widely-applicable *statutory analysis* of the Endangered Species Act, 16 U.S.C. § 1531 et seq. ("ESA"), and FWS's DPS Policy,[3] and the *factual analysis* FWS was required to undertake in that case. *Id.* The *Humane Society* court's determination that FWS can designate and delist a DPS in the same rule, and the court's determination that FWS can define "range" as a species' current range, rather than the species' historic range, are clearly supported by the court's statutory analysis and can and should be given significant weight by this Court. *Humane Society*, 865 F.3d at 600, 605. The *Humane Society* court's factual analyses, finding that FWS must address the effect of delisting a DPS on the remnant population and

[3] The ESA does not define "distinct population segment" ("DPS"), 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").

the loss of the historic range on the grey wolf in that case, however, are non-binding and should not be persuasive to this Court, as those findings were based on specific factual issues presented to that court by the grey wolf rule in that case. *Id*. at 600–01, 605–06. Those same issues are not before this Court. As clearly articulated in Ranchers' Brief in Support of their Cross-Motion for Summary Judgment and Response to Plaintiffs' Motions for Summary Judgment, this Court should decline to extend the factual findings of *Humane Society* to the Ninth Circuit. *See* ECF No. 209, at 21–27.

Instead of addressing the non-binding nature of *Humane Society*, Plaintiff Wild Rockies cites to *Tucson Herpetological Soc. v. Salazar*, 566 F.3d 870 (2009), as the binding authority in the Ninth Circuit that requires FWS to consider the loss of historic range on a species. This is a novel argument that Wild Rockies failed to previously introduce to this Court. Wild Rockies argues that the various references to the historic range of the grizzly bear in the 2017 Final Rule are insufficient to meet the burden established by *Tucson*. Wild Rockies, however, misconstrues the *Tucson* opinion.

In *Tucson*, the Ninth Circuit looked to the requirements set forth in *Defenders of Wildlife v. Norton* ("*Norton*"), necessitating the then-Secretary of the Interior to "at least explain her conclusion that the area in which the species can no longer live is not a 'significant portion of its range.'" *Norton*, 258 F.3d 1136, 1145 (2001). In

Tucson, the court analyzed the specific rule involved, which removed the flat-tailed horned lizard from the List of Threatened and Endangered Species, and found that the Secretary complied with *Norton* by examining the lizard's persistence through most of its current, remaining range. *Id*. at 878. The *Tucson* court specified that the Secretary looked to the lost habitat in a site-specific manner and specifically cited to the lizard's persistence in its remaining range "to corroborate [FWS's] conclusion that the lost portions of the lizard's range [did] not provide any unique or critical function for the well-being of the species." *Id*. at 877. Finally, the *Tucson* court noted that the Secretary also considered that the isolation of the lizard populations did not "represent a critical pathway for maintenance of genetic diversity." *Id*. at 878.

Notwithstanding Wild Rockies' characterization, what *Tucson* actually holds is that quantifying the "historical range" is only done to "establish a 'temporal baseline," against which FWS is supposed to compare the lost habitat to determine if it is a "significant portion of the species' overall range." *Id*. at 875–76. The court's holding did not go nearly as far as *Humane Society*, nor did it deal specifically with distinct population segments. Wild Rockies incorrectly asserts that *Tucson* requires FWS to examine the effect of the loss of the historic range on the Greater Yellowstone Ecosystem ("GYE") grizzly bear DPS. In reality, *Tucson* is readily

distinguishable from this case and does not support Plaintiffs' continued reliance on *Humane Society*.

Even if this Court were to follow *Tucson*, what Wild Rockies ignores is that the required analysis set forth by the *Tucson* court is almost identical to the analysis FWS articulated in the 2017 Final Rule. First, FWS determined that the GYE grizzly bear DPS was sustainable in its current range. 2017 Final Rule, 82 Fed. Reg. 30,509–12. Second, FWS addressed the grizzly bear in a site-specific manner, and has done so since at least 1982, making the determination that the GYE population is recovered and sustainable on its own, in its current, remaining range. *Id*. at 30,511. Third, FWS specifically determined that connectivity was not necessary to sustain the population and that it would not affect the GYE grizzly bear population. *Id.* at 30,517–18. Therefore, even if FWS is required to examine the "historic range" of the grizzly bear population, based on *Tucson*, the 2017 Final Rule does so sufficiently enough to comply with Ninth Circuit precedent.

Overall, Plaintiffs have failed to support their arguments based on *Humane Society* and this Court should decline to unnecessarily adopt the holding of the D.C. Circuit in the Ninth Circuit. Even if this Court considers *Tucson* to be controlling precedent, FWS has met the requirements set forth by that court.

II. PLAINTIFFS REFUSE TO ACKNOWLEDGE THAT THE GREATER YELLOWSTONE ECOSYSTEM GRIZZLY BEAR HAS ALWAYS BEEN TREATED AND MANAGED AS A DISTINCT POPULATION SEGMENT

Plaintiff WildEarth Guardians claims that because the entire grizzly bear population in North America was listed as a whole, the GYE grizzly bear DPS cannot be delisted independent of the remainder of the population. *See* ECF No. 224, at 8–10. WildEarth ignores the clear and overwhelming evidence presented by Ranchers that, not only can the DPS be designated and delisted, but that FWS has nearly always treated the six North American populations of the grizzly bear as distinct segments. *See* ECF No. 209, at 28–33. WildEarth claims that this Court cannot look to the 1993 Recovery Plan, which specifically contemplates the delisting of individual populations, because recovery plans are "non-binding and routinely revised." ECF No. 224, at 9, n. 2. Ranchers do not argue that the 1993 Recovery Plan is binding, but rather, that it is one piece of clear evidence before this Court, among many, that the GYE grizzly bear has always been treated as a distinct segment of the grizzly bear population managed by FWS. *See* ECF No. 209, at 28–33. In fact, 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). In addition, while the 1993 Recovery Plan was later revised, the treatment of the grizzly bear as six distinct segments continued long thereafter.

While WildEarth argues that FWS acknowledged that the delisting of the GYE DPS could have an effect on the other grizzly bear populations, WildEarth overstates FWS's factual determinations. In reality, the Review of the 2017 Final Rule, which WildEarth cites to, states the only clear effect that delisting the GYE grizzly bear DPS may have on the other populations is a potential negative impact on connectivity. Review of 2017 Final Rule, 83 Fed. Reg. 18,737, 18,739–41 (April 30, 2018). Connectivity is not a requirement of recovery. *Id.*

The simple fact that the GYE grizzly bear population has nearly always been treated as its own separate and distinct population entirely undercuts Plaintiffs' position that designating and delisting the GYE grizzly bear population will have some speculative, detrimental effect on the North American grizzly bear population as a whole.

III. THE ORIGINAL INTENT OF THE ESA WAS TO AID IN SPECIES' RECOVERY AND THEN RETURN SPECIES' MANAGEMENT TO THE STATES

This Court should not overlook the fact that the clear intent behind the ESA is to identify threatened or endangered species, aid in their recovery, and then return management of those 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)). This Court should not substitute its judgment for Congress's clear intent.

It is painfully obvious that Plaintiffs simply do not support state-level management. For example, while it may be somewhat heartening that WildEarth has changed its position regarding the benefit of human-led reintroduction of grizzly bears into the GYE area, it persists in its argument that human-led reintroduction cannot support FWS's recovery finding. *See* ECF No. 209, 19–20; *see also* ECF No 224, at 24–25. What WildEarth fails to understand or acknowledge, however, is that human-led reintroduction supports FWS's recovery finding, in that it allows for FWS to continue to aid the states, in conjunction with the Indian tribes, in the management of the delisted species under the state management plans. WildEarth is essentially, and ironically, objecting to the continued aid of the federal government in the management of a delisted population.

CONCLUSION

This Court should not be persuaded by the call to action presented by Plaintiffs in this matter. This case presents an example of the ESA functioning as Congress intended. The federal government has assisted the states with the recovery of their local grizzly bear populations for more than 40 years and has achieved success. The appropriate course of action now, consistent with the intent of the ESA and with the

2017 Final Rule, is to return management to the states. This Court should not undo that success.

DATED this 22nd day of August 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply contains 1,935 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 22nd day of August 2018.

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

CERTIFICATE OF SERVICE

I hereby certify that, on August 22, 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 August 22, 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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