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

CENTER FOR BIOLOGICAL DIVERSITY, *Plaintiff*, v. DAVID BERNHARDT, Secretary of the Interior; and MARGARET EVERSON, Principal Deputy Director of U.S. Fish and Wildlife Service, *Defendants*, and STATE OF WYOMING and STATE OF IDAHO, *Intervenor-Defendants* WYOMING STOCK GROWERS ASSOCIATION, WYOMING FARM BUREAU FEDERATION, and UTAH FARM BUREAU FEDERATION, *Intervenor-Defendants*.	Case No. 9:19-cv-00109-DLC **BRIEF IN SUPPORT OF WYOMING STOCK GROWERS ASSOCIATION, WYOMING FARM BUREAU FEDERATION, AND UTAH FARM BUREAU FEDERATION'S CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO CENTER FOR BIOLOGICAL DIVERSITY'S MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

This lawsuit is a continuation of the Center for Biological Diversity's ("CBD") region-wide attacks on the (notably successful) efforts to delist recovered populations of grizzly bears in the conterminal United States. This time, CBD is focusing its attention on the grizzly bear recovery plan. In short, this lawsuit centers around CBD's unfounded contention that the U.S. Fish and Wildlife Service's ("FWS") denial of CBD's petition to force a rulemaking pertaining to the lower-48 grizzly bear recovery plan violates both the Administrative Procedure Act ("APA") and the Endangered Species Act ("ESA").

CBD attempts to argue that because recovery plans make statements as to goals for population recovery, CBD can petition FWS to reevaluate a recovery plan. CBD urges this Court to enforce non-binding statements contained within a recovery plan against FWS. Additionally, CBD seeks to force this Court to tell FWS how to allocate its resources based on a non-binding guidance document.

The major flaw in CBD's reasoning, however, is that no court has ever held that recovery plans are binding rules that are subject to the APA's rulemaking procedure. Moreover, CBD's attempt to force this Court to hold FWS's past decisions accountable to new, *post hoc* considerations violates this Court's charge under the APA to examine the record as it was properly before the agency at the time the agency issued its guidance. Finally, CBD is time-barred from receiving the relief

it requests. Accordingly, this Court can easily reject CBD's arguments and enter summary judgment on all claims against CBD.

FACTUAL BACKGROUND

The grizzly bear was first listed as a "threatened" species under the ESA in 1975 and the first recovery plan for the species was approved in 1982. AR000048.[1] That recovery plan was significantly revised in 1993, adding additional management objectives and updated information to establish what FWS terms "Habitat-Based Recovery Criteria." AR000048–49. These criteria center around securing core habitat for grizzly bear populations, as well as managing impacts from motorized access, developed recreation sites, and livestock grazing. AR000049–54. These criteria and associated management techniques have been overwhelmingly successful—the Greater Yellowstone Ecosystem grizzly bear population has met all recovery criteria since at least 2006 and has been removed from the endangered and threatened species list twice.[2] *Removing the Greater Yellowstone Ecosystem*

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[1] Citations to AR###### are to the Administrative Record, as supplemented, lodged by FWS, ECF Nos. 39 and 53, where "######" indicates the specific, bates-numbered page or pages of the record cited.

[2] Both delistings have been set aside for *procedural* defects. *See generally Crow Indian Tribe v. United States*, 343 F. Supp. 3d 999 (D. Mont. 2018) (setting aside the 2017 Final Rule for a procedural defect) *appeal filed* Case No. 18-36078 (9th Cir. Dec. 26, 2018); *Greater Yellowstone Coal. v. Servheen*, 665 F.3d 1010 (9th Cir. 2011) (setting aside the 2007 Final Rule for failing to consider the effect of the loss of white bark pine on the Greater Yellowstone Ecosystem grizzly bear population).

Population of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife ("2017 Final Rule"), 82 Fed. Reg. 30,502 (June 30, 2017); *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* ("2007 Final Rule"), 72 Fed. Reg. 14,866 (Mar. 29, 2007).

Despite the success of grizzly bear recovery efforts, CBD desired revisions to the 1993 Grizzly Bear Recovery Plan. *See generally Compl.*, No. 9:19-cv-00109-DLC, ECF No. 1;[3] CHRISTOPHER SERVHEEN, U.S. FISH & WILDLIFE SERVICE, GRIZZLY BEAR RECOVERY PLAN (1993) ("1993 Grizzly Bear Recovery Plan"); AR000309–483. On June 18, 2014, CBD submitted a petition for rulemaking, urging FWS to amend the 1993 Grizzly Bear Recovery Plan to include an analysis of the potential for other areas to be used in recovery of the conterminous grizzly bear populations. AR000010–46. In its petition, CBD specifically requested that FWS evaluate areas of historical grizzly bear range to determine if additional habitat is suitable for grizzly bear recovery, including historical areas in Arizona, California, Colorado, Nevada, New Mexico, Oregon, Utah, and Washington. AR000018–23. CBD based its petition on the non-binding statements contained within the existing

[3] Hereinafter, citations to court filings will be based upon the electronic docket contained within this Court's CM/ECF database for Case No. 9:19-cv-00109-DLC, unless otherwise specified.

1993 Grizzly Bear Recovery Plan, and the plan supplements, that FWS would consider additional areas for suitability. AR000011–12.

FWS denied CBD's petition on September 22, 2014, noting that statements within recovery plans are not binding upon the agency, and that recovery plans do not fall under the purview of notice and comment rulemaking provided by the APA. AR000008–09 (observing that "[r]ecovery plans are not rules under the APA, [and p]lans are statements of intention, not a contract."). Moreover, FWS stated "we believe we have satisfied our statutory responsibility for recovery planning and implementation for the grizzly bear" and described its efforts to prioritize grizzly bear planning and recovery since the early 1980s. AR000008–09.

Following FWS's denial, CBD filed suit, asserting four claims for relief, namely that: (1) FWS was required to prepare a five-year status review for the grizzly bear; (2) the recovery plan fails to provide for the conservation and survival of the species; (3) FWS was required by the recovery plan to consider additional historic range; and (4) a recovery plan is a "rule" under the terms of the APA, and therefore must be adopted in accordance with notice and comment procedures. *See Compl*. ¶¶ 38–68.

CBD and Federal Defendants agreed to settle CBD's first claim. ECF No. 37. Accordingly, only Claims Two through Four remain to be decided. On May 19, 2020, CBD filed its *Motion for Summary Judgment* ("CBD's Motion"), ECF No. 54,

and a *Brief in Support of Motion for Summary Judgment* ("CBD's Br."), ECF No. 55. Intervenor-Defendants, Wyoming Stock Growers Association, Wyoming Farm Bureau Federation, and Utah Farm Bureau Federation (collectively, "Agricultural Associations"), hereby respond to CBD's Motion and Brief, and submit this *Brief in Support of Agricultural Associations' Cross-Motion for Summary Judgment and Response to CBD's Motion for Summary Judgment*.

STANDARD OF REVIEW

FWS's decision to deny a petition for rulemaking is reviewed according to the APA's arbitrary and capricious standard, which provides, in relevant part, that a court shall "hold unlawful and set aside" an agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . ." 5 U.S.C. § 706(2)(A), (C); *see WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 816–18 (D.C. Cir. 1981) (discussing the "Scope of Review of Agency Decisions Not to Promulgate Rules"). Courts afford greater deference to an agency's discretionary decision to not promulgate a rule. *See WWHT*, 656 F.2d at 818 ("[T]here are very few cases in which courts have forced agencies to institute rulemaking proceedings on a particular issue after it has declined to do so."). Indeed, an agency's refusal to initiate a rulemaking will be overturned "only in the rarest and most compelling of circumstances . . . ." *Id*.

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In APA actions, a court may not make "findings" of fact but must simply review the facts as presented in the administrative record. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review . . . to the agency decision based on the record the agency presents to the reviewing court.") (citing 5 U.S.C. § 706; *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) *abrogated in separate part by Califano v. Sanders*, 430 U.S. 99, 104–07 (1977)). Summary judgment is therefore applicable to cases involving judicial review of the "decision of an administrative agency which is itself the finder of fact." *Occidental Eng'g Co. v. I.N.S.*, 753 F.2d 766, 770 (9th Cir. 1985) ("[S]ummary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did.").

Accordingly, this Court should decide this case on the Parties' cross-motions for summary judgment based on the APA's arbitrary and capricious standard.

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ARGUMENT

I. THE 1993 GRIZZLY BEAR RECOVERY PLAN IS NOT A "RULE" WITHIN THE MEANING OF THE ADMINISTRATIVE PROCEDURE ACT

This Court should reject CBD's attempt to have this Court hold what no prior court has—that recovery plans promulgated under the terms of the ESA are "rules" under sections 551 and 553 of the APA. *See* CBD's Br. at 10–19.[4] The majority of CBD's arguments are based on this unfounded, unsupported, and legally infirm interpretation of the ESA and APA. Accordingly, this Court should reject CBD's argument that FWS is required to reevaluate a recovery plan by petition or can be required to enforce non-binding statements contained in a recovery plan.

The APA's rulemaking procedure places a nondiscretionary duty on FWS *only* in connection with "substantive" rules. 5 U.S.C. § 553. The APA's rulemaking procedure is not required with respect to "interpretative rules" nor "general statements of policy." 5 U.S.C. § 553(b)(A) ("[T]his subsection does not

[4] Agricultural Associations are unaware of any court precedent holding that recovery plans are "rules" under the terms of section 553 of the APA. CBD's attempt to categorize this case as a case of first impression, however, is incorrect. *See* CBD's Br. at 17 ("[N]o court has addressed whether recovery plans . . . qualify as rules under the APA . . . ."). In reality, no court has held that a recovery plan is a rule because, as demonstrated below, the courts have routinely found that recovery plans are guidance documents and not rules. Accordingly, this case is merely an application of this Circuit's precedent; CBD just asks this Court to blind itself to logical reasoning.

apply . . . to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . . .").

"[Interpretative] rules are those which merely clarify or explain existing law or regulations." *Powderly v. Schweiker*, 704 F.2d 1092, 1098 (9th Cir. 1983); *see Alcaraz v. Block*, 746 F.2d 593, 613 (9th Cir. 1984) (quoting *Powderly*). "They express the agency's intended course of action, its tentative view of the meaning of a particular statutory term, or internal house-keeping measures organizing agency activities." *Batterton v. Marshall*, 648 F.2d 694, 702 (D.C. Cir. 1980). By contrast, substantive rules "grant rights, impose obligations, or produce other significant effects on private interests." *Id*. at 701–02.

"[G]eneral statements of policy" are "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1012–13 (9th Cir. 1987) (quoting TOM C. CLARK, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1st ed. 1947)); *accord San Diego Air Sports Ctr., Inc. v. F.A.A.*, 887 F.2d 966, 970 n.4 (9th Cir. 1989); *Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666 (D.C. Cir. 1978) . In other words, a policy statement is intended "to allow agencies to announce their 'tentative intentions for the future,' . . . *without binding themselves*." *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987) (emphasis added) (quoting

Pac. Gas & Elec. Co. v. Fed. Power Com., 506 F.2d 33, 38 (D.C. Cir. 1974)); *see Guardian Fed. Sav. & Loan Ass'n*, 589 F.2d at 666 ("A general statement of policy . . . does not establish a binding norm. It is not finally determinative of the issues or rights to which it is addressed.") (internal quotation and citation omitted). "The agency retains the discretion and the authority to change its position—even abruptly—in any specific case because a change in its policy does not affect the legal norm." *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997).

In the Ninth Circuit, to qualify as an exempted statement of policy, two requirements must be satisfied: (1) the policy operates only prospectively;[5] and (2) the policy does "not establish a binding norm," and is not "finally determinative of the issues or rights to which [it] address[es]," but instead leaves officials "free to consider the individual facts in the various cases that arise." *Mada-Luna*, 813 F.2d at 1014 (internal quotations and citations omitted); *see Am. Bus Ass'n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980) (A policy statement is in reality a binding norm (and therefore a rule) *unless* (1) it acts only prospectively, and (2) it "genuinely leaves the agency and its decision-makers free to exercise discretion."); *see also W. Coal Traffic League v. United States*, 694 F.2d 378, 392 (5th Cir. 1982) ("[T]he

[5] Notably, this element is undisputed. CBD affirmatively states that the 1993 Grizzly Bear Recovery Plan sets forth "prospective policy." *Plaintiff's Statement of Undisputed Facts*, ECF No. 56, ¶ 6. Accordingly, Agricultural Associations will only address the second element.

status of guidelines as 'rules' is determined by their binding character.") (citing *American Trucking Ass'ns Inc. v. ICC*, 659 F.2d 452, 463 (5th Cir. 1981)).

Here, as demonstrated below, the 1993 Grizzly Bear Recovery Plan, like all recovery plans, operates as a guidance document, providing prospective considerations and procedures that FWS may undertake when pursuing its ultimate goal of recovering the grizzly bear population in the conterminal United States. The 1993 Grizzly Recovery Plan, however, does not bind FWS to certain recovery criteria—those criteria are statutorily established and evaluated by the listing and delisting factors set forth by the ESA.

A. The 1993 Grizzly Bear Recovery Plan Is Not A Binding Authority

CBD's attempt to treat the 1993 Grizzly Bear Recovery Plan as a binding, petitionable rule, would require this Court to violate Ninth Circuit precedent and treat a non-binding authority as creating a substantive rule.

In the context of recovery plans, the Ninth Circuit has concluded that such plans "are not binding authorities." *Conservation Cong. v. Finley*, 774 F. 3d 611, 614 (9th Cir. 2014) ("Recovery Plans are prepared in accordance with section 1533(f) of the Endangered Species Act for all endangered and threatened species, and while they provide guidance for the conservation of those species, they are not binding authorities.") (citing *Friends of Blackwater v. Salazar*, 691 F.3d 428, 432–34 (D.C. Cir. 2012)); *see Cascadia Wildlands v. Bureau of Indian Aff.*, 801 F.3d

1105, 1114 n.8 (9th Cir. 2015) ("The Endangered Species Act does not mandate compliance with recovery plans for endangered species."); *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 547–48 (11th Cir. 1996) (holding "recovery plans are for guidance purposes only"). In *Friends of Blackwater*, the D.C. Circuit adopted the helpful analogy that recovery plans are akin to a roadmap that guides FWS to a statutorily-defined destination without setting forth mandatory gateways or an obligatory route. *Friends of Blackwater*, 691 F.3d at 434.

> Although a map may help a traveler chart his course, it is the sign at the end of the road, here the *five statutory factors indicating recovery*, and not a mark on the map that *tells him his journey is over*. Moreover, as with a map, it is possible to reach one's destination – recovery of the species – by a pathway neither contemplated by the traveler setting out nor indicated on the map.

Id. (emphasis added).

In *Conservation Congress*, the Ninth Circuit considered plaintiff's assertion that the federal agencies involved had failed to adequately consider the effect of "a lumber thinning and fuel reduction project in northern California" on the Northern Spotted Owl. 774 F.3d at 614. There, plaintiff argued, in relevant part, that the U.S. Forest Service failed to follow recommendations contained in a 2011 recovery plan for the Northern Spotted Owl. *Id*. at 620. The Ninth Circuit rejected plaintiff's argument, stating "[d]eclining to adopt particular recommendations in a recovery plan or a study—*neither of which is binding on an agency*—does not constitute

failing to consider them under 50 C.F.R. § 402.16."[6] *Id*. (emphasis added). The Ninth Circuit upheld the district court's grant of summary judgment against plaintiff. *Id*.

For this same reason, CBD's reliance on *Defenders of Wildlife v. Tuggle* is equally unavailing. *See* CBD's Br. at 17. In *Tuggle*, the district court was reviewing FWS's established "procedures for wolf control actions taken as part of the administration of the Mexican wolf reintroduction project . . . ." 607 F. Supp. 2d 1095, 1097 (D. Ariz. 2009). The district court in that case considered the adoption of a standard operating procedure ("SOP"), which began with the adoption of a 2003 memorandum of understanding, to be a final agency action because the SOP *superseded* a prior, binding rule. *Id*. at 1110. Additionally, the district court found the SOP established specific, binding criteria for determining the status of nuisance or problem wolves and providing for specific wolf control actions, including permanent removal. *Id*. at 1114–15. Accordingly, the district court reasoned that the SOP and memorandum of understanding were *binding* management documents.

[6] Further, CBD cannot now assert a failure to consider argument, given the draft *Grizzly Bear Secure Core Analysis for the San Juan and Sierra Nevada Mountains' Historic Range*, dated July 2, 2019, demonstrates FWS is currently evaluating potential grizzly bear habitat in the San Juan Mountains and other areas—the very relief that CBD seeks here. AR000872–89.

Id. at 1114–15. *Defenders* is thus inapposite when evaluating non-binding recovery plans.[7]

Here, just as in *Conservation Congress*, FWS is not bound to follow or adopt any particular recommendations contained in the 1993 Grizzly Bear Recovery Plan. The 1993 Grizzly Bear Recovery Plan, like all recovery plans, is non-binding. *See* AR000309–483. FWS is left "free to consider the individual facts in the various cases that arise." *Mada-Luna*, 813 F.2d at 1014 (quoting *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983)); *see Fund for Animals*, 85 F.3d at 547 ("By providing general guidance as to what is required in a recovery plan, the ESA 'breathe[s] discretion at every pore.'") (alteration in original) (quoting *Strickland v. Morton*, 519 F.2d 467, 469 (9th Cir. 1975)). In fact, the discretion to consider individual facts is mandated by the delisting process outlined in the ESA, which requires FWS to conduct a complete five-factor analysis (the same analysis

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[7] CBD also cites a string of cases in a footnote. *See* CBD's Br. at 17 n.4. None of these cases, however, concern recovery plans, but rather concern binding documents, like an FWS press release functionally prohibiting the importation of certain sport-hunting trophies because FWS determined the hunting would not "enhance the survival of the species." *Safari Club Int'l v. Zinke*, 878 F.3d 316, 320 (D.C. Cir. 2017). Additionally, one case CBD cites to, *Animal Legal Defense Fund v. Veneman*, has been vacated. 469 F.3d 826 (9th Cir. 2006) *vacated on rehearing en banc by* 490 F.3d 725 (9th Cir. 2007) (Mem.). CBD's cursory argument that this Court can still rely on the case because that vacatur was based on "other grounds" ignores the procedural posture of that case, where the Ninth Circuit "decided *sua sponte* to rehear the case," and then the appellant filed a motion to dismiss its appeal. *Animal Legal Def. Fund v. Veneman*, 490 F.3d at 729 (Thomas, J., dissenting). Accordingly, none of the cited cases support CBD's argument.

required to list a species) in order to delist a species, regardless of the "objective, measurable criteria" presented in the recovery plan. *See* 16 U.S.C. § 1533(a)(1) (setting forth the factors for determining whether a species is endangered or threatened); *Friends of Blackwater*, 691 F.3d at 434 (stating that regardless of the steps delineated in a recovery plan, the "five statutory factors indicating recovery" control).

Accordingly, the 1993 Grizzly Bear Recovery Plan is not a "substantive rule," and is thus exempted from the requirements of section 553 of the APA, because it "genuinely leaves the agency and its decision-makers free to exercise discretion." *Am. Bus Ass'n*, 627 F.2d at 529; *accord Mada-Luna*, 813 F.2d at 1014.

B. The Fact That The 1993 Grizzly Bear Recovery Plan, Like All Recovery Plans, Was Provided For Public Notice And Comment Does Not Make It A Substantive Rule

In addition to the Ninth Circuit's clear statement that recovery plans are non-binding guidance documents, this Court should reject CBD's unconvincing argument that recovery plans should be considered "substantive rules" under the APA because recovery plans are required to be provided for public notice and comment. CBD's Br. at 16.

Before the Secretary approves a new or revised recovery plan, they must "provide public notice and an opportunity for public review and comment on such

plan." 16 U.S.C. § 1533. Such provision, however, does not automatically transform a recovery plan into a substantive rule.

The D.C. Circuit rejected this exact argument in *Friends of Blackwater*. There, the D.C. Circuit was reviewing the district court's grant of summary judgment based on plaintiff's claim that FWS improperly removed the "West Virginia Northern Flying Squirrel from the list of endangered species when several criteria in the agency's Recovery Plan for the species had not been satisfied." *Friends of Blackwater*, 691 F.3d at 429. The D.C. Circuit held "the district court erred by interpreting the Recovery Plan as binding the Secretary in his delisting decision." *Id*. Notably, the panel stated: "A plan is a statement of intention, not a contract. If the plan is overtaken by events, then there is no need to change the plan; it may simply be irrelevant." *Id*. at 434. Importantly, despite the APA's requirement that an agency provide recovery plans for notice and comment, the D.C. Circuit found nothing "unusual about a statute that requires an agency to publish a non-binding document." *Id*. at 434 (citing *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 69, 72 (2004)). Overall, the court made clear that recovery plans, despite the notice and comment requirement, are not binding on agencies and operate as guidance documents.

Here, the fact that the 1993 Grizzly Bear Recovery Plan was presented for notice and comment, like all recovery plans, does not make it a substantive rule,

subject to the rulemaking provisions of the APA. The 1993 Grizzly Bear Recovery Plan, like all recovery plans, constitutes a general statement of policy, providing FWS non-binding guidance for the recovery of the lower-48 grizzly bear populations. FWS has not violated any duty or subjected itself to the mandatory rulemaking procedures established in 5 U.S.C. § 553 merely because FWS has pursued a separate path for recovery or has not adopted a suggestion contained in the recovery plan.

Overall, for the simple reason that recovery plans are not binding, the 1993 Grizzly Bear Recovery Plan is a statement of general policy exempt from the rulemaking provisions of the APA, and, accordingly, FWS properly denied CBD's petition for rulemaking to amend that plan. CBD, however, relies on the false premise that the APA applies here as the foundation for all of its arguments. Given that this foundation finds no support in law, this Court should reject each of CBD's arguments that are based upon the same erroneous premise.[8] Summary judgment

[8] For example, CBD's argument that FWS has failed to evaluate historical, but currently unoccupied, grizzly bear habitat away from the core recovery areas in Wyoming, Montana, Idaho, and Washington stems from what CBD deems as an enforceable commitment within the 1993 Grizzly Bear Recovery Plan. CBD's Br. at 19–25. As demonstrated at length above, however, any purported commitment in a recovery plan cannot be enforced against FWS, and, therefore, is not an appropriate basis to attempt to compel FWS to engage in a rulemaking. *See Friends of Blackwater*, 691 F.3d at 434 ("A [recovery] plan is a statement of intention, not a contract. If the plan is overtaken by events, then there is no need to change the plan; it may simply be irrelevant."). FWS's denial of CBD's rulemaking petition on this basis was proper.

should be entered in favor of the Federal Defendants, the Agricultural Associations, and the other Intervenors.

II. THE U.S. FISH AND WILDLIFE'S ADDITIONAL REASONS FOR DENYING THE CENTER FOR BIOLOGICAL DIVERSITY'S PETITION ARE PROPER

Even if this Court examines the factual bases for which FWS denied CBD's petition, this Court should uphold FWS's choice to prioritize recovery efforts for the lower-48 grizzly bear populations to areas with suitable habitat—to best ensure success and focus limited recovery funding. CBD's argument, in trying to dictate to FWS how it must allocate its limited resources in seeking to recover the various lower-48 grizzly bear populations, is without merit and must be rejected. *See* CBD's Br. at 25–31.

As the expert agency charged with grizzly bear conservation and recovery, FWS is afforded discretion to implement the ESA's mandates so long as its recovery plans are designed to meet the goal of conservation and survival of the species. *See Fund for Animals*, 85 F.3d at 548 ("[T]he Recovery Plan is not a document with the force of law divesting all discretion and judgment from [FWS] . . . ."); *see also Strahan v. Linnon*, 967 F. Supp. 581, 597–98 (D. Mass. 1997) ("While it is true that § 4(f) [of the ESA] does not permit an agency unbridled discretion, and imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible, the requirement does not mean that the agency can be forced to

include specific measures in its recovery plan.") (internal quotations and citation omitted).

With FWS's original 1982 Grizzly Bear Recovery Plan, FWS reasonably limited its recovery efforts to areas in Wyoming, Montana, Idaho, and Washington that were most likely to lead to the conservation and recovery of the grizzly bear population. *See* U.S. FISH & WILDLIFE SERVICE, GRIZZLY BEAR RECOVERY PLAN (1982) ("1982 Grizzly Bear Recovery Plan"), AR000484–619; AR000492 ("These six grizzly bear ecosystems appear to presently have adequate space and suitable habitat to offer the potential for securing and restoring this species as a viable self-sustaining member of each ecosystem."). FWS did not pursue recovery in other locations where recovery would be more tenuous. *See* AR000493 ("Bear biologists and land managers believe these three major areas [the Yellowstone, Northern Continental Divide, and Cabinet-Yaak Grizzly Bear Ecosystems] should be selected as areas of first priority and funding sought to provide for the tenets of the recovery plan."). The 1993 Grizzly Bear Recovery Plan slightly expanded this guidance, based on the grizzly bear populations at the time. AR000335 ("One objective of the recovery plan . . . is to recover grizzly bear populations in all of the ecosystems that are known to have suitable space and habitat. Grizzly bear populations occurred in five of the seven ecosystems as of 1990."). Yet again, FWS focused its recovery

efforts to areas where efforts would be most successful. AR000337–38 (establishing a "Perspective on Areas of Recovery").

CBD, however, provides no contemporaneous scientific information to demonstrate that FWS's guidance decisions—at the time—were wrong. Instead, CBD points to a post-decisional draft report prepared by FWS in 2019 that evaluates the potential for grizzly bear recovery in the San Juan Mountains of Colorado (an area that CBD disingenuously argues that FWS has refused to consider) to argue that FWS's refusal to expand or reconsider the 1993 Grizzly Bear Recovery Plan was not based on the best available science. CBD's Br. at 27; *see* AR000872–89. The 2019 draft report, however, was not before FWS at the time it denied CBD's petition over half a decade ago in 2014, and, therefore, CBD has provided no substantive argument that FWS's denial of CBD's petition was "counter to the evidence before the agency." CBD's Br. at 27 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). It is not the role of this Court to find or review facts that were not before the agency at the time of its decision, but rather this Court must examine the facts as they were presently available to the agency when evaluating CBD's challenge. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review . . . to the agency decision based on the record the agency presents to the reviewing court.") (citations omitted).

CBD has presented no relevant evidence, contained in the Administrative Record, that FWS failed to examine information properly before it when FWS denied CBD's 2014 petition. Finally, insofar as CBD argues that it—and not FWS—is in the best position to determine the most impactful use of FWS's limited funding for species recovery, CBD's Br. at 27–31, Agricultural Associations defer to the arguments presented by Federal Defendants.

III. THE CENTER FOR BIOLOGICAL DIVERSITY IS BARRED FROM CHALLENGING THE CONTENTS OF THE 1993 GRIZZLY BEAR RECOVERY PLAN

This Court should also reject CBD's attempt to challenge the contents of the 1993 Grizzly Bear Recovery Plan itself, CBD's Br. at 31–42, because CBD's arguments are both time-barred and the contents for the 1993 Grizzly Bear Recovery Plan are not subject to judicial review under the APA.

To the first, the general six-year statute of limitations for federal civil actions is applicable to APA challenges. *See Turtle Island Restoration Network v. U.S. Dept. of Com.*, 438 F.3d 937, 942–43 (9th Cir. 2006) ("Although the APA itself contains no specific statute of limitations, a general six-year civil action statute of limitations applies to challenges under the APA.") (citing 28 U.S.C. § 2401(a) ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.")

(alteration in *Turtle Island*)); *Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988) (holding that § 2401(a) applies to the APA)).

Here, any challenge to the contents of the 1993 Grizzly Bear Recovery Plan would have had to be made by 1999. Being most generous to CBD, the earliest action CBD took that could be considered a challenge to the 1993 Grizzly Bear Recovery Plan occurred in 2014 when CBD submitted its petition for rulemaking. *See* AR000010–11 (CBD's petition, dated June 18, 2014). Accordingly, the statute of limitations had expired by approximately 15 years by the time CBD initiated any action and thus, CBD is time-barred from receiving the relief it seeks.

To the second, and more importantly, recovery plans are not agency actions made reviewable by the APA because they are not final agency actions. *See Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) ("For an agency action to be final, the action must (1) 'mark the consummation of the agency's decisionmaking process' and (2) 'be one by which rights or obligations have been determined, or from which legal consequences will flow.'") (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). In making this determination, courts are to "focus on the practical and legal effects of the agency action," so as to determine finality "in a pragmatic and flexible manner." *Id*. (quoting *Or. Nat. Res. Council v. Harrell*, 52 F.3d 1499, 1504 (9th Cir. 1995); *Dietary Supplemental Coal., Inc. v. Sullivan*,

978 F.2d 560 (9th Cir. 1992); and citing *Cal. Dep't of Educ. v. Bennett*, 833 F.2d 827, 833 (9th Cir. 1987)).

As fully demonstrated above, recovery plans are non-binding—they do not create any legal rights or obligations for FWS or any third parties. *See Conservation Cong.*, 774 F.3d at 614 (recovery plans "are not binding authorities"). Accordingly, recovery plans are not agency actions "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178 (quoting *Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). Thus, the 1993 Grizzly Bear Recovery Plan is not reviewable under the APA.[9] *See Friends of the Wild Swan, Inc. v. Dir. of U.S. Fish & Wildlife Serv.*, 745 F. App'x 718, 720–21 (9th Cir. 2018) (holding recovery plans are not "final agency actions"); *Center for Biological Diversity v. Zinke*, 399 F. Supp. 3d 940, 950 (D. Ariz. 2019) (holding the same). Accordingly, this Court should reject CBD's arguments and should enter summary judgment in favor of Federal Defendants, Agricultural Associations, and the other Intervenors.

[9] Even if the 1993 Grizzly Bear Recovery Plan was reviewable under the APA, CBD has presented no evidence, contained in the Administrative Record, that FWS failed to examine information properly before it when FWS established the guidance in the 1993 Grizzly Bear Recovery Plan.

CONCLUSION

For the foregoing reasons, this Court should deny the Center for Biological Diversity's Motion for Summary Judgment and should enter summary judgment as to all claims in favor of Federal Defendants, Agricultural Associations, and the other Intervenors.

DATED this 6th day of July 2020.

Respectfully submitted,

/s/ Cody J. Wisniewski

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief in Support contains 5,544 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 the 6th day of July 2020.

/s/ Cody J. Wisniewski
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CERTIFICATE OF SERVICE

I hereby certify on July 6, 2020, 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).

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