

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

WESTERN WATERSHEDS PROJECT,)
ALLIANCE FOR THE WILDLIFE ROCKIES, and)
YELLOWSTONE TO UINTAS CONNECTION,)

No. 1:20-cv-00860-APM

Plaintiffs,

v.

**APPLICANTS IN INTERVENTIONS’
PROPOSED RESPONSE IN
OPPOSITION TO PLAINTIFFS’
MOTION FOR PRELIMINARY
INJUNCTION**

DAVID BERNHARDT, in his official capacity as)
Secretary of the United States Department of the)
Interior; UNITED STATES FISH AND)
WILDLIFE SERVICE; and UNITED STATES)
FOREST SERVICE,)

Defendants,

and

UPPER GREEN RIVER CATTLE)
ASSOCIATION; SOMMERS RANCH, LLC;)
PRICE CATTLE RANCH; MURDOCK LAND)
AND LIVESTOCK CO.; and WYOMING STOCK)
GROWERS ASSOCIATION,)

Applicants in Intervention.

Applicants for Intervention, the Upper Green River Cattle Association, Sommers Ranch, LLC, Price Cattle Ranch, Murdock Land and Livestock Co., and the Wyoming Stock Growers Association (collectively “Ranchers”), submit this Proposed Response in Opposition to Plaintiffs’ Motion for Preliminary Injunction (ECF No. 15) (“Pls’ Mo.”) and Plaintiffs Memorandum of Points and Authorities in Support of their Motion (ECF No. 15-1) (“Pls’ Memo.”). Ranchers support this response with the following Memorandum of Points and Authorities, and the Declaration of Albert Sommers, attached to Ranchers’ Motion to Intervene

as Exhibit A (“Sommers Decl.”). Ranchers also rely on certain documents found in the administrative record to be lodged with this Court by the Federal Defendants.

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MEMORANDUM OF POINTS AND AUTHORITIES

After nearly 20 years of review and analysis by the United States Forest Service and the United States Fish and Wildlife Service (“FWS”), including the preparation of a final environmental impact statement (“EIS”), a draft supplemental EIS, a draft EIS, and another final EIS, as well as several biological assessments and biological opinions, the Upper Green River Grazing Allotment finally has been reauthorized. *See* Upper Green River Area Rangeland Project, Final Environmental Impact Statement (“Final EIS”)¹ at 2–3; Record of Decision, Upper Green River Area Rangeland Project (“ROD”)² at 5. Plaintiffs now ask this Court to preliminarily enjoin Ranchers and the Federal Defendants from implementing certain aspects of their grazing permit, specifically the limited use of lethal means to remove nuisance grizzly bears.³ The Motion should be denied insofar as it concerns grizzly bear removals.

I. FACTUAL BACKGROUND

A. The Green River Drift and Green River Drift Trail

Central to this case is Ranchers’ use the Upper Green River Cattle Allotment located on the Bridger-Teton National Forest in Wyoming. The Upper Green River Cattle Allotment is accessed by use of the Green River Drift and Green River Drift Trail, which is the oldest continually used, traditional cattle drive in the State of Wyoming, and perhaps the United States.

¹ Available at https://www.fs.usda.gov/nfs/11558/www/nepa/3077_FSPLT3_4092241.pdf.

² Available at https://www.fs.usda.gov/nfs/11558/www/nepa/3077_FSPLT3_4875958.pdf.

³ Plaintiffs also seek to enjoin cattle from crossing through an enclosure surrounding habitat for the Kendall Warm Spring dace, an endangered species of fish. *See* Pls’ Mo. at 2. Although the Administrative Record produced will demonstrate that the habitat diversity that results from these cattle crossings actually benefits the species, Ranchers will agree to move their cattle around the enclosure, instead of passing through, during the pendency of this litigation. Accordingly, this aspect of Plaintiffs’ Motion will not be discussed herein. However, Ranchers strongly oppose Plaintiffs’ Motion insofar as it seeks to enjoin any lethal removal of nuisance grizzly bears from the Upper Green River Area Rangeland Project area.

Sommers Decl. ¶ 36. Since at least 1896, the Green River Drift has functioned as the essential connector between seasonal grazing lands for cattle ranches in the Upper Green River Valley. *Id.* ¶ 23. Indeed, use of the Drift began when the grazing of public lands in the Green River Valley region was still free and unregulated. *Id.* Ranches in the Upper Green River Valley region, including the Sommers Ranch, LLC, the Price Cattle Ranch, and the Murdock Land and Livestock Co., are dispersed along waterways and valleys that contain irrigable land for producing hay. *Id.* ¶ 24. Grazing land is located further out on the surrounding mesa, desert, foothill, and mountain pastures based on a seasonal feeding pattern. *Id.* The Green River Drift Trail provides the route for Upper Green River Cattle Association members and other area ranchers to trail cattle from spring grazing at the southern end of the Drift to summer and fall grazing at the northern end. *Id.* ¶ 25. In the fall, the cattle “drift” back to the south on their own back along the route of the Drift and are then sorted and trailed to their home ranches. *Id.*

The Green River Drift Trail extends for 68 miles, from high desert mesas in the southern part of the county to the Bridger-Teton National Forest in the northern part of the county. *Id.* ¶ 26. The path of the Drift makes use of natural features such as draws and creeks to funnel the cattle onto a common path and provide a stable supply of water and feed. *Id.* ¶ 27. Overall, the route and use of the Drift today is very similar to its route and use in its early history. *Id.* The Green River Drift follows the Green and New Fork Rivers for much of its route and has the Wind River Mountains as its backdrop to the north and east, the Wyoming Range in the far distance to the west, and the Gras Venture Mountains to the north. *Id.* ¶ 28.

In the spring, starting from May 1 through May 25, Upper Green River Cattle Association members graze their cattle on Bureau of Land Management (“BLM”) grazing allotments on the Little Colorado Desert or the Green River Mesa. *Id.* ¶ 29. Spring grazing on

BLM managed land lasts about two months: May through June. *Id.* Cowboys start removing cattle from spring BLM pastures and trailing them up to 68 miles north beginning the middle of June and ending the middle of July. *Id.* ¶ 30. There is a 3 to 4-week period for trailing the cattle to the mountains from the time they are taken off the spring pasture until they are on the pasture systems on National Forest land. *Id.* Each ranch's cattle herd is on the trail approximately two weeks. *Id.* Summer grazing begins June 16 and lasts through October 15 of every year. *Id.* ¶ 31. The haying season on private lands corresponds with the summer grazing season on public lands. *Id.*

As cold weather arrives in the late fall, the cattle drift back out of the forest on their own, moving south back toward their home pastures. *Id.* ¶ 32. Strategically located fences direct their movement down to the sorting grounds where they are sorted by brand, rounded up, and trailed to their respective home ranches, and shipped to market in October and November. *Id.* In the winter, cattle graze on the hayed pastures and meadows at their respective home ranches. *Id.* ¶ 33. As the pastures become snow-covered, the livestock are fed from the hay supply that grew in the same fields over the spring and summer. *Id.* This seasonal pattern has been repeated, year after year, since at least the 1890s. *Id.* ¶ 34. Ranchers rely on the Drift to trail their cattle to crucial pasturage and continue to pass this tradition on to the next generations. *Id.* In fact, the pasturage accessed via the Drift is *essential* to the ranchers' operations because of the feed it provides to growing cattle, and the time it gives private land to grow the next hay crop, which will feed the cattle herds during the next winter. *Id.* ¶ 35.

In November 2013, the Green River Drift Trail was listed in the National Register of Historic Places as a Traditional Cultural Property ("TCP"). *Id.* ¶ 36. The Drift is representative of a rural community's land use patterns and reflects the local ranchers' traditional occupational

culture, including shared practices, customs, and beliefs. *Id.* It is the oldest continually used stock drive in Wyoming and is one of the only remaining cattle trails still in use in the same manner in which it was originally developed. *Id.* Moreover, the Drift is the first listed TCP in the nation to recognize a traditional culture rooted in a shared occupation—ranching—rather than in ethnicity or religious belief. *Id.*

B. The Upper Green River Cattle Association and Upper Green River Allotment

The Upper Green River Cattle Association was established in 1916, and consists of most of the ranchers operating in the Upper Green River Valley and utilizing the Green River Drift. *Id.* ¶ 37. The Association also maintains a common allotment, the Upper Green River Cattle Allotment, on the Bridger-Teton National Forest. *Id.* ¶ 38. The Upper Green River Cattle Allotment consists of more than 130,000 acres, making it one of the largest allotments in the National Forest System. *Id.* ¶ 39. This allotment is held for the common use of Association members, and authorizes grazing of over 7,000 cow/calf pairs or yearlings, owned individually by Association members. *Id.*

The Upper Green River Allotment is divided into 13 pastures and four pasture rotations. *Id.* ¶ 40. Other areas within the Allotment are designated for common use as livestock driveways, which are utilized by cattle as they enter the Allotment and their primary pastures, and as they “drift” back from their primary pastures. *Id.* Association members are responsible for the maintenance and upkeep of common improvements, including fencing and rider cabins. *Id.* ¶ 41. The Association hires five range riders to oversee their cattle in these four pasture systems. In fact, the Association has had range riders with their cattle every day of use of the Upper Green River Cattle Allotment since 1916. *Id.* ¶ 42.

C. The Renewal of the Upper Green River Project Grazing Allotments

On July 23, 2003, the Forest Service announced its intent to prepare an environmental impact statement (“EIS”) to analyze the environmental impacts of renewing six grazing allotments for 10-years, including the Upper Green River Allotment. Final EIS at 23. A final EIS and record of decision were released in October 2004; however, the record of decision was later withdrawn to conduct additional analysis. *Id.* A notice of intent to prepare a supplement was then published in the Federal Register in December 2009, and a draft supplemental EIS was released for public review in June 2010. *Id.* Again, in order to conduct yet more additional analysis, a draft EIS to replace the 2004 analysis was prepared and released for public review in November 2016. *Id.* at 23–24. On October 27, 2017, the Final EIS was released, with a record of decision being issued nearly two years later, on October 11, 2019. *See* 82 Fed. Reg. 49,802 (Oct. 27, 2017).

Two biological opinions (“BiOp”) issued pursuant to Section 7 of the Endangered Species Act are central to Plaintiffs’ challenges. First, on April 29, 2019, FWS issued a biological opinion in which it found that renewing these grazing allotments was not likely to jeopardize the recovery of the grizzly bear, and authorized the take of up to 72 grizzlies over the 10-year project term (2019–2028). *See* Biological Opinion for the Effects to the Grizzly Bear from the Upper Green River Area Rangeland Project (“2019 BiOp”).⁴ The incidental take statement (“ITS”) associated with this BiOp included numerous terms and conditions to protect

⁴ Ranchers note that Plaintiffs’ Exhibit 2 to its Motion purports to be an accurate copy of the 2019 BiOp. *See* Declaration of Kristine Akland at ¶ 5 (ECF No. 15-5). However, Plaintiffs’ Exhibit 2 contains numerous highlights and comments not present in the original document, to which Ranchers’ oppose. An unaltered copy of this document, without Plaintiffs’ improper commentary, can be found at https://www.fs.usda.gov/nfs/11558/www/nepa/3077_FSPLT3_4876414.pdf

the long-term viability of grizzly and to ensure that the action would not lead to jeopardy. *Id.* at 49. Further, although the ITS allows for the take of up to 72 bears over 10 years, the ITS requires that take be evaluated on a rolling three-year basis, such that if take exceeds a specified number in any year, or in the rolling three-year period, then FWS mandates that consultation be re-initiated. *Id.* at 47–49. The second BiOp, dated September 3, 2014, amended an earlier biological opinion providing an ITS concerning the authorized lethal removal of nuisance grizzly bears associated with the earlier Upper Green River Area Rangeland Project authorization. *See* Biological Opinion for the 2014 Supplement to the 2013 Supplement and 2010 Amendment to the 1999 Biological Assessment for Livestock Grazing on the Northern Portions of the Pinedale Ranger District (“2014 BiOp”).⁵

II. THE PRELIMINARY INJUNCTION STANDARD

To obtain a preliminary injunction, Plaintiffs must establish that: 1) they are likely to succeed on the merits; 2) they are likely to suffer irreparable harm in the absence of preliminary relief; 3) the balance of equities tips in their favor; and 4) an injunction serves the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Injunctive relief is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. *Id.* at 22.

Here, Plaintiffs’ Motion falls short of the *Winter* standard for injunctive relief. Plaintiffs have not established that they are likely to succeed on the merits, they have shown no irreparable harm, the balance of the equities weighs against them, and an injunction is not in the public interest. Moreover, Plaintiffs’ Motion seeks preliminary relief that exceeds that which they

⁵ A copy of which can be found at Plaintiffs’ Exhibit 7 to its Motion (ECF No. 15-11).

would obtain should they prevail on the merits. Accordingly, Plaintiffs' Motion should be denied.

III. PLAINTIFFS' MOTION MUST BE DENIED BECAUSE PLAINTIFFS SEEK PRELIMINARY RELIEF BEYOND THAT WHICH THEY WOULD BE ENTITLED TO SHOULD THEY PREVAIL ON THE MERITS

With their Motion, Plaintiffs plainly seek to enjoin the lethal removal of any grizzly bear within the Upper Green River Area Rangeland Project, including from the Upper Green River Cattle Allotment. Pls' Mo. at 3; Pls' Memo. at 25. Plaintiffs characterize their request as preserving the status quo. Pls' Mo. at 2. Plaintiffs' requested preliminary relief, however, would not *preserve* the status quo, but instead would *alter* it. For this reason alone, Plaintiffs' Motion should be denied.

Assuming *arguendo*, that Plaintiffs succeed on the merits and the 2019 BiOp is set aside as they request, the prior biological opinion, issued in 2014 (the "2014 BiOp"), along with its terms and conditions, would come back into effect. *See* 43 U.S.C. § 1752(c)(2) ("The terms and conditions in a grazing permit or lease that has expired . . . shall be continued under a new permit or lease until the date on which the Secretary concerned completes any environmental analysis and documentation for the permit or lease required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and other applicable laws." (emphasis added)). The 2014 BiOp is not subject to challenge in this case. *See* Compl. (ECF No. 1).

Ranchers and other Upper Green River Valley ranchers had operated under the terms of the 2014 BiOp for nearly 5 years. During this time, the grizzly bear population in the Greater Yellowstone Ecosystem continued to increase. 2019 BiOp at 16, 46. This increase continued despite that, under the terms of the 2014 BiOp, and its prior BiOPs, lethal removal of nuisance

grizzly bears was authorized and taken.⁶ *Id.* Even if Plaintiffs prevail, the lethal removal of nuisance grizzly bears within the Project Area will continue to be authorized by the 2014 BiOp, albeit at a lower level than that provided by the 2019 BiOp.

Thus, Plaintiffs seek preliminary relief that exceeds that which they would be entitled should they prevail. This relief should be denied. *See Brown v. Fed. Bureau of Investigation*, 793 F. Supp. 2d 368, 283 (D.D.C. 2011) (“Because a preliminary injunction would far exceed the relief plaintiff would get if he succeeded on the merits, it will not be granted.”).

IV. PLAINTIFFS CANNOT MEET THEIR HEAVY BURDEN TO ENJOIN THE LIMITED USE OF LETHAL MEANS TO REMOVE DANGEROUS, NUISANCE GRIZZLY BEARS

A. Plaintiffs Are Unlikely to Prevail on the Merits⁷

Plaintiffs focus their challenge to the 2019 BiOp on a single claim, that FWS failed to consider the distinction between female and male grizzly bears potentially lethally removed from the Project Area. Pls’ Memo. at 13–16. According to Plaintiffs, this failure to differentiate between female and male grizzly bear take renders the 2019 BiOp arbitrary and capricious, and in violation of Section 7 of the Endangered Species Act. This argument fails for several reasons, most importantly, because Plaintiffs ignore the analysis and discussion provided in the Final EIS. In the Final EIS, the agencies discuss whether the removal of female grizzly bears would “significantly and negatively affect grizzly bear population growth.” Final EIS at 318. In short, the agencies found that “survival of adult females did not change for several decades. Therefore,

⁶ The 2014 BiOp continued and expanded on lethal removals authorized since at least 1999 by prior biological opinions and assessments. *See* 2019 BiOp at 38 (summarizing previous consultations).

⁷ Ranchers reserve the right to make additional arguments during merits briefing following the lodging of the Administrative Record by Federal Defendants. Ranchers join that portion of Federal Defendants brief addressing Plaintiffs’ likelihood of success on merits, and incorporate the same herein by reference.

at the ecosystem level, there was no evidence that changes in any mortality factor, including removals in response to cattle depredation, contributed to a detectable change in survival of independent-aged individuals.” *Id.* at 319.

Plaintiffs hypothetical that all 72 bears removed in the 10-year term anticipated in the Final EIS and 2019 BiOp also ignores the evidence. *See* Pls’ Memo. at 14 (“All or a majority of the bears killed pursuant to the ITS *could* be female.”). Historically, female grizzly bears represent a smaller proportion of total removals. Between 2010 and 2014, only 4 of 14 grizzly bears removed from the Project area were female. Final EIS at 315. In fact, all of the grizzly bears removed from the Project Area in 2019 cited by Plaintiffs were males. *See* Pls’ Memo. at 20; Pls’ Mo. at Exh. 11 (unique identifier numbers 201914, 201915, and 201920, presumably those cited by Plaintiffs, were adult male bears removed due to cattle depredations).

Plaintiffs also mischaracterize the terms of the ITS, implying that FWS would have no oversight of lethal grizzly bear removals until the 72-bear threshold was reached. Pls’ Memo. at 13–16. In fact, however, the ITS limits lethal removals of nuisance bears on a rolling, three-year basis. *See* 2019 BiOp at 49. For example, the ITS anticipates that no more than 16 bears will have been removed by the end of 2021. 2019 BiOp at 43-44. If these numbers are exceeded, the Forest Service is required to re-initiate consultation with FWS. *Id.* at 50. Further, it is important to note that FWS’s Grizzly Bear Recovery Coordinator, and not the Forest Service, is tasked with the ultimate decision on when a lethal removal is approved. *Id.* at 48.

Finally, Plaintiffs completely ignore the fact that the grizzly bear population in the Greater Yellowstone Ecosystem has, in fact, recovered. Beginning in 2005, and continuing each year since, the Greater Yellowstone Ecosystem population of grizzly bear has met the criteria for recovery set in its Recovery Plan. *See* 82 Fed. Reg. 30,502, 30,504–505 (June 30, 2017). As a

result, FWS has twice attempted to delist this population segment. 70 Fed. Reg. 69,854 (Nov. 17, 2005); 82 Fed. Reg. 30,502 (June 30, 2017). Although both attempts were set aside for procedural defects, neither reviewing court held that the bear population failed to meet the recovery criteria established for it. See *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015 (9th Cir. 2011) (set aside for failure to consider whitebark pine seed availability); *Crow Indian Tribe v. United States*, 343 F. Supp. 3d 999 (D. Mont. 2018) (set aside for failure to consider delisting's effect on the "remnant" population and for further discussion of the recalibration provision), No. 18-36078 (9th Cir. argued May 5, 2020). This population growth occurred despite that lethal removals of nuisance grizzly bears have been authorized, and taken, in the Project Area since 1999. See 2014 BiOp at 28; 2019 BiOp at 29–31, 38. Accordingly, FWS reasonably concluded that the removal of depredating bears would result only in incidental take. 2019 BiOp at 45. Plaintiffs' Motion should be denied.

B. Plaintiffs Have Not Demonstrated a Likelihood of Irreparable Harm

To obtain a preliminary injunction, Plaintiffs must demonstrate that irreparable injury to their personal interests is likely before the Court can issue a ruling on the merits. *Winter*, 555 U.S. at 22; *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 163 (2010).

Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered. Only when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief. Therefore, if a trial on the merits can be conducted before the injury would occur there is no need for interlocutory relief.

C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 2948.1, p. 129 (3rd ed. 2013). There will be no trial on the merits of Plaintiffs' claims. Rather, the Court will decide the case based on the parties' fully briefed cross-motions for summary judgment. The question

before the Court, then, is whether injunctive relief is necessary pending the Court's decision on the merits.

Here, Plaintiffs assert environmental injuries and imply that environmental injuries are *per se* irreparable. Pls' Memo. at 19–20. While courts have recognized that “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration,” *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 545 (1987), “the Supreme Court has not established that, as a rule, any potential environmental injury merits an injunction.” *The Lands Council v. McNair*, 537 F.3d 981, 1004 (9th Cir. 2008), overruled on other grounds by *Winter*, 555 U.S. at 20. A “generic and attenuated allegation of environmental harm falls well short of the concrete injury to the plaintiff needed to justify the extraordinary remedy of injunctive relief.” *Pac. Rivers Council v. U.S. Forest Serv.*, 942 F. Supp. 2d 1014, 1025 (E.D. Cal. 2013). To show such an injury, a plaintiff must (1) identify a specific aspect of the proposed action, (2) link that act to plaintiff's specific interests, and (3) demonstrate how that act will harm those interests. See *Sierra Forest Legacy v. Sherman*, 951 F. Supp. 2d 1100, 1111–12 (E.D. Cal. 2013); *Friends of the Wild Swan v. Christiansen*, 955 F. Supp. 2d 1197, 1202 (D. Mont. 2013).

Here, Plaintiffs have failed to demonstrate any imminent, concrete, and particularized injury that would likely occur absent injunctive relief. In apparent support⁸ of their Motion, Plaintiffs have attached three declarations, each of which fails. The Declaration of Dr. David Mattson (ECF No. 15-2) presents his opinion of the adequacy of the Final EIS and 2019 BiOp, but provides no indication of any harm he suffers from the potential removal of nuisance grizzly

⁸ Plaintiffs do not reference the Declarations of Mr. Ratner or Mr. Carter in their briefing; accordingly, Ranchers are unsure how much reliance Plaintiffs place on these declarations.

bears from the Project Area. Dr. Mattson's disagreement with the Forest Service's and the FWS's expert opinions presented in the Final EIS and 2019 BiOp do not demonstrate any imminent injury necessitating injunctive relief.

The Declaration of John G. Carter (ECF No. 15-4) fares little better. Mr. Carter does purport injury, from "livestock grazing, timber projects, roads and mining." *Id.* ¶ 11. None of these activities would be enjoined by Plaintiffs' Motion, however. Most of Mr. Carter's declaration describes his long-held opposition to livestock grazing. The remaining portions describe his views on management of other, non-grizzly, species, including cutthroat trout and sage grouse. *See, e.g., id.* ¶¶ 27, 28. Mr. Carter does not discuss any harm that he suffers from the removal of nuisance grizzly bears from the Project Area, or how Plaintiffs' requested preliminary relief would protect his interests.

In fact, only the Declaration of Jonathan B. Ratner (ECF No. 15-3), makes any attempt to show potential harm to his interests. Nonetheless, Mr. Ratner's declaration contains no concrete or particularized injury. Indeed, as it relates to grizzly bear, Mr. Ratner makes only the bald assertion that "I am injured by the killing of grizzly bears and wolves merely to satisfy permittees' self-interest." *Id.* ¶ 43. Mr. Ratner makes no attempt to describe how the lethal removal of nuisance grizzly bears affect any of his purported interests, which he describes as hiking, camping, backpacking, skiing, and collecting data on range conditions. *Id.* ¶ 21. Instead, Mr. Ratner goes to great lengths to describe his efforts to prohibit ranching on public lands, and attributes any injury he does purportedly suffer as "Harms from Livestock Grazing," *id.* at 10, not from grizzly bear management.

Indeed, Plaintiffs have provided no evidence that the potential limited removal of a small number of female grizzly bears will have any effect whatsoever on the total grizzly bear

population, that these removals would make it more difficult for Plaintiffs to pursue their scientific research, or that these removals would make it harder to observe grizzly bears in the wild. *See Pub. Emps. for Envtl. Responsibility v. Bernhardt*, 2020 WL 601783, *4 (D.D.C. Feb. 7, 2020) (rejecting plaintiffs’ allegations of harm as unsupported by its declarations). Accordingly, the wholly unsupported claims of imminent harm absent preliminary relief presented in Plaintiffs’ briefing cannot support the extraordinary relief requested. Plaintiffs’ have failed to meet their burden of demonstrating the likelihood of irreparable harm.

C. The Balance of the Equities Does Not Support an Injunction

In balancing the equities, courts must weigh the plaintiffs’ injuries against the hardships that issuing an injunction would impose on defendants. *Amoco Prod. Co.*, 480 U.S. at 542. “[B]oth economic and environmental interests are relevant factors, and both carry weight.” *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 765 (9th Cir. 2014); *see also Amoco Prod. Co.*, 480 U.S. at 545. As demonstrated above, Plaintiffs will suffer no irreparable harm from limited lethal removal of nuisance grizzly bears absent an injunction. In contrast, Ranchers would incur substantial harm should an injunction issue. *See Sommers Decl.* ¶¶ 52–57.

Lethal removals of grizzly bear are only utilized as a last resort, after other, non-lethal means have failed to change a nuisance bear’s behavior. *Id.* ¶ 52. However, once a grizzly bear’s behavior reaches the level where lethal removal is authorized, that bear presents a significant safety risk. *Id.* Therefore, the loss of the ability to conduct lethal removals of nuisance grizzly bears on the Upper Green River Cattle Allotment could result in Association members being unable to utilize their grazing permits due to the increased risk of bear depredation and threat to human safety for the Association’s range riders. *Id.*

Without the Upper Green River Cattle Allotment, members of the Upper Green River Cattle Association would not have economically viable ranching operations. *Id.* ¶ 53. The Upper Green River Cattle Allotment accounts for all of the forage needed for the members' herds during an exceedingly critical time, when calves are raised to market weight. *Id.* No alternative pasture is available to rent or purchase within a reasonable distance from Association members' base ranches. *Id.* Accordingly, it is impossible for Association members to secure alternative forage, and these members would be forced to reduce their herd size to an uneconomically viable level, likely at a significantly reduced price. *Id.* These resulting economic losses would force many of the Association's member's ranches to go out of business. In fact, these ranches have stayed viable for over 100 years only by following green grass to the mountains, which allows the ranches to grow pasture and hay for the brutal winters of the Green River Valley. *Id.* ¶ 54.

Without the Upper Green River Cattle Allotment, even temporarily, many of these ranches would be sold, and, undoubtedly, some would be subdivided. *Id.* ¶ 55. Ranches that did not go out of business would likely have to reduce their herd sizes to one-half or one-third of their current numbers. *Id.* Further, should Ranchers' operations and historic grazing practices be diminished or eliminated, large ungulate migration routes and other important wildlife habitats would be affected. *Id.* ¶ 56. It is the ability to maintain large ranches in the West that has kept regional landscapes like the Green River Valley intact. *Id.* Without these ranches, these large tracts of open lands likely would be lost to other development. *Id.*

At bottom, any impacts to Plaintiffs resulting from the removal of a small number of dangerous, nuisance grizzly bears do not outweigh the millions of dollars at stake annually, and the ongoing viability of their cattle operations, should Ranchers be prohibited from the use of the

Upper Green River Allotment. *See Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34, 51 (D.D.C. 2011) (“economic loss that threatens the survival of the movant’s business can amount to irreparable harm”); *Power Mobility Coalition v. Leavitt*, 404 F. Supp. 2d 190, 204 (D.D.C. 2005) (“economic loss that threatens the survival of a movant’s business amounts to irreparable harm”). The balance of the equities weighs against a preliminary injunction.

D. An Injunction Is Not in the Public Interest

Finally, under the fourth *Winter* factor, Plaintiffs must demonstrate that an injunction is in the public interest. *Winter*, 555 U.S. at 374. To demonstrate that an injunction serves the public interest, Plaintiffs point to the generalized proposition that preliminary relief is in the public interest in cases arising under the Endangered Species Act. *See* Pls’ Memo. at 22. *Winter*, however, was a suit arising under the Endangered Species Act, and the Supreme Court there held that an injunction was not in the public interest, in part, because “the training [at issue] has been going on for 40 years with no documented episode of harm to a marine mammal.” *Winter*, 555 U.S. at 381. Accordingly, there is no *per se* rule that injunctive relief is always in the public interest in endangered species cases.

Similar to *Winter*, here, limited lethal removals of nuisance grizzly bears have been occurring within the Upper Green River Area Rangeland Project area since at least 1999, with no appreciable impact to population growth of grizzly bears within the Greater Yellowstone Ecosystem. *See supra* at 8–9.

Moreover, should injunctive relief follow and Ranchers be forced out of business, without these ranches, adjacent communities would lose a valuable source of year-round commerce. Sommers Decl. ¶ 57. Ranchers conservatively sell a combined 2,300 feeder cattle and another 650 cull cattle. *Id.* These are cattle sales in excess of \$3 million to \$5 million

dollars, much of which goes back into the local economies. *Id.* Indeed, ranching serves as the backbone for the local economy in the Green River Valley, including the small, rural towns of Pinedale, Daniel, Boulder, and Cora, Wyoming. *Id.* Accordingly, injunctive relief is not in the public interest.

V. SHOULD THIS COURT GRANT PLAINTIFFS' MOTION, A SUBSTANTIAL BOND SHOULD BE REQUIRED

Rule 65(c) of the Federal Rules of Civil Procedure provides that “The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” Fed. R. Civ. P. 65(c).

Here, Plaintiffs have not requested an exemption from the mandatory bonding requirement. *See* Pls' Mo. As demonstrated above, Ranchers cattle sales exceed \$3 million to \$5 million dollars annually. Sommers Decl. ¶ 57. Moreover, if Ranchers are unable to utilize their grazing permits on the Upper Green River Cattle Allotment because preliminary relief makes it unsafe to do so, they stand to lose even more, potentially up to the value of their ranches. *Id.* ¶¶ 55, 56. Accordingly, Ranchers request that, should this Court grant Plaintiffs' Motion insofar as it pertains to the lethal removal of nuisance grizzly bears, Plaintiffs should be required to post a substantial bond, in an amount that covers lost annual sales of Ranchers' cattle and the potential loss of their cattle operations.

According to the most recent IRS Form 990s available, Western Watersheds Project reported a total revenue of \$931,878,⁹ Alliance for the Wild Rockies reported a total revenue of

⁹ Western Watersheds Project Form 990 for the tax year 2018 available at: https://projects.propublica.org/nonprofits/display_990/943202140/01_2020_prefixes_93-94%2F943202140_201812_990_2020011417026595 (last visited May 13, 2020).

\$168,436,¹⁰ and Yellowstone to Uintas Connection reported a total revenue of \$90,565.¹¹ Thus, collectively, Plaintiffs report yearly revenue of nearly \$1.2 million. Accordingly, Plaintiffs should have no problem affording a substantial bond in this case. Should Plaintiffs plead poverty, Ranchers respectfully request limited discovery to properly ascertain the basis for their claims.

VI. CONCLUSION

For the foregoing reasons, Ranchers respectfully ask the Court to deny Plaintiffs' Motion for a Preliminary Injunction insofar as it requests the Court to enjoin the limited removal of nuisance grizzly bears.

DATED this 19th day of May 2020.

Respectfully submitted:

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¹⁰ Alliance for the Wild Rockies Form 990 for the tax year 2017 available at: https://projects.propublica.org/nonprofits/display_990/810455740/03_2019_prefixes_76-81%2F810455740_201712_990EZ_2019030716153853 (last visited May 13, 2020).

¹¹ Yellowstone to Uintas Connection Form 990 for the tax year 2018 available at: https://projects.propublica.org/nonprofits/display_990/454968217/05_2019_prefixes_45-46%2F454968217_201812_990EZ_2019052116327573 (last visited May 13, 2020).

CERTIFICATE OF SERVICE

I hereby certify that on the May 20, 2020, I electronically transmitted the attached document to the Clerk's office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to all parties or counsel of record, as more fully reflected on the Notice of Electronic Filing.

/s/ Brian E. Gregg