

to undermine the research and conclusions that serve as the basis for the Ranchers' grazing authorizations. The Ranchers have an immediate and definite interest in this case that cannot be diminished by Plaintiffs' efforts to reduce the arguments to AUM calculations.

Applicants for Intervention, the Upper Green River Cattle Association ("UGRCA"), Sommers Ranch, LLC, Price Cattle Ranch, Murdock Land & Livestock Co., and the Wyoming Stock Growers Association (collectively "Ranchers"), filed their Motion to Intervene (ECF No. 21) on May 20, 2020. On May 22, 2020, Plaintiffs filed their Response in Opposition to Motions to Intervene ("Pls.' Opp'n") (ECF No. 25), responding to both Ranchers' Motion to Intervene and the Motion to Intervene filed separately by the State of Wyoming (ECF No. 18). Now, Ranchers file this Reply.

Insofar as Ranchers' Motion is concerned, Plaintiffs have conceded that Ranchers meet three of the four prongs for intervention because they only dispute the Ranchers' alleged injury. *See Smoke v. Norton*, 252 F.3d 468, 470 (D.C. Cir. 2001) (outlining four-part test for intervention as of right). On this single element, Plaintiffs make two primary arguments in opposition.¹ First, Plaintiffs argue that Ranchers have not demonstrated an injury or impairment to their cognizable interests. Pls.' Opp'n 3–7. Second, Plaintiffs argue that permissive intervention is not appropriate because Ranchers' have not identified their defenses to Plaintiffs' challenges. *Id.* at 8. Both arguments are without merit and should be rejected by this Court.

¹ Plaintiffs have also made a third argument regarding the State of Wyoming's interests as a sovereign. Pls.' Opp'n 7. Because that argument does not pertain to Ranchers, it will not be discussed herein.

Plaintiffs first argue that Ranchers rely “on the false premise that Plaintiffs’ requested relief will necessarily reduce authorized AUMs [a measure of forage authorized to be grazed by Ranchers’ livestock].” *Id.* at 4. Plaintiffs’ blithely assert that their requested relief is protection of grizzly bears, not, at least for now, the reduction of grazing. Thus, according to Plaintiffs, Ranchers have failed to meet the third prong for intervention as of right. *Id.* at 3; Plaintiffs misconstrue the nature of the conflict they have put before the court, Ranchers’ interests and harm, and the inevitable consequences of the relief they seek.²

Under the current management regime, in which limited lethal removals are authorized, UGRCA members have lost an average of 14% of their calves to depredations in a single grazing season. Decl. of Albert Sommers ¶ 46. (“Sommers Decl.”) (ECF No. 21-2). To clarify, even when problem grizzly bears can eventually be removed, grizzly bears kill cattle. Each calf or cow has a financial value that contributes to the Ranchers’ livelihood. Dead cattle mean financial loss. Further, “once a grizzly bear’s behavior reaches the level where lethal removal is authorized, that bear presents a significant risk to livestock.” *Id.* ¶ 52. Plaintiffs have not disputed these facts, but instead argue that Ranchers should simply accept the losses if cattle are grazed within the Project area. These losses and the risk of increased losses that will arise if Plaintiffs prevail are the injuries that give Ranchers standing here.

Plaintiffs’ motion for preliminary injunction recognizes that “Grizzly bear persistence is ‘negatively associated with human and livestock densities.’” ECF No. 15-1 at 4 (citing the 2019

² Moreover, Plaintiffs’ argument is disingenuous. Plaintiffs themselves acknowledge that they may seek to enjoin grazing in the future. *See* ECF No. 15-1 at 2 (“Plaintiffs do not request this Court enjoin livestock grazing *at this time...*”) (emphasis added).

BiOp). This is why the majority of “grizzly bear mortalities in the GYE stemmed from anthropogenic causes,” largely due to “conflicts with livestock.”³ *Id.* (citing Mattson Decl. ¶9). Indeed, Plaintiffs openly state that “[if] livestock are available to grizzly bears, *some level of depredation will inevitably occur* and can lead to local increases in bear densities.” *Id.* (citing Mattson Decl. ¶¶ 5 and 6) (emphasis added). The admittedly *inevitable* loss of livestock to a livestock operator could not be a more palpable, obvious injury, and it is the relief requested by Plaintiffs in their Proposed Order. *See* ECF No. 15-16 (“Defendants shall not lethally remove grizzly bears from the allotments...”).

At bottom, Plaintiffs’ requested relief, that lethal removals be prohibited,⁴ would increase risks to Ranchers and necessitate that Ranchers make difficult business and human safety decisions. As Mr. Sommers noted, there is no alternative pasture available; the Upper Green River Cattle Allotment, and the forage that it provides, is critical to UGRCA members’ century-old livestock operations. Sommers Decl. ¶ 53. Accordingly, if Plaintiffs obtain the relief that they ultimately seek, Ranchers will be forced to either: (a) accept the increased cumulative risk

³ There is an additional injury caused by the cumulative effect of bear depredation. A single depredating grizzly bear creates a certain, elevated level of risk to UGRCA range riders and livestock. If that bear is removed, the risk is abated (at least until the next depredating bear appears in the Project area). However, if that bear is not removed the risk remains elevated. When a second depredating bear presents itself, the level of risk is increased not over the abated level, but over the elevated level. Likewise, each subsequent bear that presents itself in the Project area increases the level of risk, and these risks compound. What Plaintiffs have ignored is the cumulative effect of allowing known depredating bears to remain, or to return after being relocated.

⁴ *See* Plaintiffs’ Motion for Preliminary Injunction (ECF No. 15), seeking to enjoin lethal removals of grizzly bear.

that multiple depredating bears create, likely losing larger numbers of livestock and placing their range riders at increased risk of harm from multiple bears acclimated to preying on livestock; or (b) make the decision to reduce the grizzly/cattle conflict by reducing the number of cattle that they graze, potentially to zero. *See id.* ¶ 52. Either alternative will have direct effects on the economic viability of UGRCA members' ranches. *Id.* ¶¶ 52–55. These effects demonstrate the impairment to Ranchers' cognizable interests that will result should Plaintiffs prevail. Intervention as of right is appropriate in this case.

Plaintiffs' second argument, that Ranchers have not provided their defenses to Plaintiffs' claims is legally and factually infirm, and must be rejected. As an initial matter, Ranchers' have provided their affirmative defenses at page 23 of their Proposed Answer to Plaintiffs' Complaint (ECF No. 21-7). Additionally, Plaintiffs rely on a single, unreported case to support their argument that Ranchers' participation would not assist this Court's consideration of this case. Pls.' Opp'n 8. *Idaho Rivers United v. Probert*, however, is easily distinguishable.

There, the applicants in intervention in a challenge to a timber sale were effectively strangers to the decision at issue. That is, they acquired their timber contracts *after* the land use decision at issue was made, and, indeed, *after* litigation had begun. *Idaho Rivers United v. Probert*, 2016 WL 10704521, *2 (D. Idaho Apr. 19, 2016). It was against that backdrop that the district court considered permissive intervention. Because the applicants in intervention had no "direct involvement in the agency's decision making process or approval," the court held that their participation would not benefit the court's resolution of the matter. *Id.* at *4.

Here, unlike *Idaho Rivers*, Ranchers' interests predate not only the decision at issue, but predate the establishment of both Federal Defendant agencies: the United States Forest Service

(established in 1905) and the U.S. Fish and Wildlife Service (established in 1940). *See* Sommers Decl. ¶ 22 (Sommers Ranch has utilized the Green River Drift since around 1900); Declaration of Margaret Jeanne Lockwood, ¶ 12 (ECF No. 21-4) (Murdock Land & Livestock Co. has utilized the Green River Drift since around 1900); Declaration of Charles Price, ¶ 12 (ECF No. 21-5) (Price Cattle Ranch has utilized the Green River Drift since around 1900). Moreover, Ranchers have actively participated in the decision-making process. *See* Sommers Decl. ¶ 6; Upper Green River Area Rangeland Project, Final Environmental Impact Statement, 593 (listing Charles Price and Albert Sommers as consulted permittees), *id.* at 595–596 (listing Charles Price, Sommers Ranch Partnership, Upper Green River Grazing Association, and Wyoming Stock Growers Association as parties filing substantive comments). Accordingly, as the operators who have used these lands for over 100 years, as the permittees who benefit from the instant Upper Green River Area Rangeland Project decision Plaintiffs seek to reverse, and as active participants in the decision-making process leading to the biological opinion and environmental impact statement at issue, Ranchers will provide a perspective different from both the Federal Defendants and the State of Wyoming. This perspective will assist this Court in its review. Should intervention as of right be denied, permissive intervention is warranted in this case.

For the foregoing reasons, and those more thoroughly discussed in Ranchers' Motion, this Court should grant Ranchers intervention as of right, or, in the alternative, permissive intervention.

DATED this 29th day of May 2020.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 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