

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

WESTERN WATERSHEDS PROJECT, <i>et al.</i> ,)	
)	No. 1:20-cv-00860-APM
<i>Plaintiffs</i> ,)	
)	
v.)	UPPER GREEN RIVER CATTLE
)	ASSOCIATION, ET AL.’S
DAVID BERNHARDT, in his official capacity as)	SUPPLEMENTAL BRIEF
Secretary of the United States Department of the)	REGARDING PLAINTIFFS’
Interior, <i>et al.</i> ,)	STANDING (RESPONSE TO
)	SECOND DECLARATION OF
<i>Defendants</i> ,)	JASON CHRISTENSEN (ECF No.
)	37))
and)	
)	
UPPER GREEN RIVER CATTLE)	
ASSOCIATION, <i>et al.</i> , and STATE OF)	
WYOMING,)	
)	
<i>Intervenors-Defendants</i> .)	
)	

Plaintiffs fail to establish that they will likely suffer injury to a protected legal interest due to Defendants’ challenged conduct; Plaintiffs therefore fail to prove standing for preliminary injunctive relief. Western Watersheds Project, *et al.* ask this court to enjoin continued lethal removal of nuisance grizzly bears preying upon livestock in the Project area. Plaintiffs’ *legal* interest, however, is the presence and survival of the species, not the existence of specific bears. Plaintiffs provide no evidence that the 2019 BiOp will substantially compromise their legal interest. In fact, historical data prove Plaintiffs’ alleged harm unlikely. Moreover, relocations and lethal removals would still be permitted without the 2019 BiOp, thus Plaintiffs have not shown that the requested injunction will redress the alleged harm. None of these defects are cured by Plaintiffs’ eleventh-hour filing of the second Christensen declaration. ECF No. 37.

I. PLAINTIFFS HAVE NOT DEMONSTRATED STANDING SUPPORTING INJUNCTIVE RELIEF

As a preliminary matter, Plaintiffs now rely on representational rather than organizational standing. *See Int’l Acad. of Oral Med. & Toxicology v. FDA*, 195 F.Supp.3d 243, 253-68 (D.D.C. 2016) (examining organizational versus representational standing). An organization establishes representational standing (a.k.a associational standing) when “(1) at least one of its members would have standing to sue in his or her own right; (2) the interests it seeks to protect are germane to the organization’s purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Sierra Club v. Fed. Energy Reg. Comm’n*, 827 F.3d 59, 65 (D.C. Cir. 2016) (internal quotation omitted).

Plaintiffs, however, cannot show that: (1) at least one member “has suffered an ‘injury-in-fact’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical’; (2) the injury is ‘fairly traceable to the challenged action’; and (3) it is ‘likely, as opposed to merely speculative that the injury will be redressed by a favorable decision.’” *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). Plaintiffs bear the burden of establishing all three elements and speculation is usually fatal to standing. *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm’n on Election Integrity*, 878 F.3d 371, 377 (D.C. Cir. 2017) (“EPIC”) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)); *Id.* at 379. Here, Plaintiffs’ alleged injury in fact, diminished presence of grizzly bears in the Project area, requires Plaintiffs to prove both a substantially increased risk of harm from the challenged action and a substantial probability that the harm will occur.¹ *Food &*

¹ Plaintiffs’ Complaint asserts multiple defects in the 2019 BiOp, but, putting the Kendall Dace aside, Plaintiffs’ pending motion attempts to establish a likelihood of success only on the merits of their claim that the 2019 BiOp failed to “evaluate the possibility of a disproportionately high number of female grizzly bears being lethally taken...” Pls.’ Mot. at 13-16. (ECF 15-1 at 20-23). Oddly, the Christensen Declaration makes no distinction between male and female takes.

Water Watch, Inc. v. Vilsack, 808 F.3d 905, 914 (D.C. Cir. 2015). Finally, “standing is not dispensed in gross.” *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 734 (2008) (internal alteration omitted). “Rather, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.” *Id.* (internal quotations omitted).

“In the context of a preliminary injunction motion, [this Circuit] require[s] the plaintiff to show a substantial likelihood of standing under the heightened standard for evaluating a motion for summary judgment.” *EPIC*, 878 F.3d at 377 (internal quotations and citations omitted); see *Food & Water Watch*, 808 F.3d at 913 (inability to establish substantial likelihood of standing warrants denial of preliminary injunction). “Thus, the plaintiff cannot ‘rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts’ that, if ‘taken to be true,’ demonstrate a substantial likelihood of standing.” *Id.* (quoting *Lujan*, 504 U.S. at 561) (ellipsis in original). Additionally, where “the parties invoking federal jurisdiction are not the object of the government action or inaction they challenge,” standing is “substantially more difficult to establish.” *Pub. Citizen, Inc. v. Nat’l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1289 (D.C. Cir. 2007) (internal quotation marks omitted).

Plaintiffs’ evidence, including Mr. Christensen’s belated declaration, fails to demonstrate any of Plaintiffs’ members would have standing to obtain injunctive relief in his or her own right. No member has established that he is facing imminent, concrete injury fairly traceable to the challenged 2019 BiOp (FS-PAR-003906–3969)² or that the purported injury would be redressed by granting Plaintiffs’ motion.

² References to “FS-PAR-XXXXXX” are to the partial administrative record compiled by the U.S. Forest Service. See ECF No. 27. To comply with LCvR 7(n), copies of all documents referenced herein are attached hereto. The 2019 BiOp is attached as Exhibit A.

A. Plaintiffs’ Legally Protected Interest is in the Species, not Specific Animals.

Aesthetic or scientific interest such as Mr. Christensen’s may, in some circumstances, provide the concrete, particularized, and imminent harm necessary to support standing, but in such cases, “the plaintiffs asserted injury because the challenged conduct threatened to diminish or deplete the *overall* supply of endangered animals available for observation and study.” *Humane Soc’y of U.S. v. Babbitt*, 46 F.3d 93, 97 (D.C. Cir. 1995) (emphasis in original). This view of standing comports with the mandate that irreparable harm to ESA-listed species must be measured at the species level, and not at the individual level. *See Nw. Env’tl. Def. Council v. U.S. Army Corps of Eng’rs*, 817 F. Supp. 2d 1290, 1315 (D. Ore. 2011) (“This makes sense because the ESA explicitly permits the taking of individual members of a species in some circumstances.”); *see also Idaho Rivers United v. U.S. Army Corps of Eng’rs*, 156 F. Supp. 3d 1252, 1262 (W.D. Wash. 2015) (“[E]ven if the Corps’ proposed dredging is likely to harm or kill individual lamprey, this fact is insufficient to establish a likelihood of irreparable harm . . . courts require a showing that the identified harm to the species is “‘significant’ vis-a-vis the overall population,” and not just that individual animals are likely to be injured.) (citation omitted).

Species-level consideration is specifically relevant in this case because the record demonstrates that bears “move freely in and out of the action area during summer through fall, and made extensive use of adjacent watersheds.” 2019 BiOp at 27 (FS-PAR-003906–3933). Further, the “number of grizzly bears in any given location (e.g. action area), fluctuates throughout the season based on food availability and other factors...” *Id.* at 29. (–3935). As the bears move in, through, and out of the Project area, the entire population must be considered.

B. The 2019 BiOp Will Not Make Plaintiffs More Likely to Suffer Legal Harm.

To establish standing, Plaintiffs must prove: (1) a substantially increased risk of diminished aesthetic and other interests via harm to the grizzly species from the 2019 BiOp, and (2) a substantial probability that the harm will now occur. *Food & Water Watch*, 808 F.3d at

914. Plaintiffs speculate that the removals allowed under the 2019 BiOp, particularly the lack of limits on removal of female grizzlies, will reduce the likelihood of viewing a grizzly in the Project area. This speculation is unsupported by evidence and fatal to standing.

1. The grizzly population continues to increase.

Here, neither Mr. Christensen nor the Plaintiffs have provided any data demonstrating that the removal of a handful of nuisance grizzly bears per year will make it harder to observe grizzly bears in the Project area. It is not self-evident that the continued yearly removal of identified conflict bears will have a negative effect on the population as a whole. Data provided by the U.S. Fish and Wildlife Service (“FWS”) and the Wyoming Game and Fish Department (“WGFD”) show that the grizzly population is growing year-over-year. See 2019 BiOp at 15–17 (FS-PAR-003921–3923) (annual growth rate estimated at 4.2 to 7.6% from 1983 to 2001, and 0 to 2.2% from 2002 to 2011). Importantly, this population growth has occurred despite the fact that lethal removals have been occurring for decades. See 2019 BiOp at 37 (FS-PAR-003943) (providing number of bear removals over the last five years).

Plaintiffs could have attempted to submit population-modeling data or other facts demonstrating a link between limited grizzly bear removals in the Project area and population decreases. *Pub. Emps. For Envtl. Responsibility v. Bernhardt*, 2020 WL 601783, *4 (D.D.C. Feb. 7, 2020) (holding plaintiff lacked standing because it provided no evidence demonstrating that agency action would make it harder to observe species in the wild). Instead, Mr. Christensen makes unsupported conclusory statements such as “[m]y interest is particularly harmed here because authorizing the killing 72 grizzly bears is significantly more bears than the FWS has ever authorized to be lethally removed” and “this amount of grizzly bear death will significantly reduce my ability to view grizzly bears.” Christensen Decl. ¶ 22. These statements, however, ignore the fundamental reason why FWS has elected to increase the allowable removal of nuisance bears: because the grizzly bear population has increased. 2019 BiOp at ii (FS-PAR-

003908) (total allowance was based upon population trends); 2016 Wyoming Management Plan, Ex. B., at vi (FS-PAR-002547) (“reduction of the population growth is a response to density dependent factors indicative of a wildlife population approaching its environmental carrying capacity”). Plaintiffs provide no data or other support indicating that a proportionate response to the increase in the grizzly bear density in the Project area (i.e., increased allowable removals in the Project area) will have a disproportionate effect on the grizzly bear population as a whole.

2. Other constraints mitigate the risk that female grizzlies will be taken.

The take of female grizzly bears is constrained independent of the 2019 BiOp. When the grizzly bear was listed as a threatened species, FWS promulgated a 4(d) Rule that provided for the lethal take of a grizzly bear found to be “committing significant depredations to lawfully present livestock.” 50 C.F.R. § 17.40(b)(i)(C). In furtherance of the Rule, in 1986, FWS, the Forest Service, and the State of Wyoming, among many others, developed the Interagency Grizzly Bear Guidelines (FS-PAR-005482–5586) (“Interagency Guidelines”) (Ex. C). This Guidance provides a detailed plan for determining grizzly bear nuisance status and for controlling nuisance grizzly bears. *Id.* at 51–72 (FS-PAR-005537–005558). In 2016, this same interagency group developed the 2016 Conservation Strategy for the Grizzly Bear in the Greater Yellowstone Ecosystem (FS-PAR-002823–2955) (“2016 Conservation Strategy”) (Ex. D). The 2016 Conservation Strategy provides that, *inter alia*, sex of the animal will be considered in any relocation or removal. 2016 Conservation Strategy at 89 (FS-PAR-002918). Further, “[r]ecognizing that conservation of female bears is essential to maintenance of a grizzly bear population, removal of conflict females will be minimized.” *Id.* Finally, “[a]lthough conflicts with livestock have the potential to result in mortality for grizzly bears, the 2016 Conservation Strategy’s specific total mortality limits will preclude population-level impacts.” 2019 BiOp at 23 (FS-PAR-003929); *see* 2016 Conservation Strategy at 35–36 (FS-PAR-002894–2955).

The 2019 BiOp incorporates and does not supersede or undermine any of these guidance documents. *See, e.g.*, 2019 BiOp at 25 (FS-PAR-003931) (nuisance bears “must be taken in accordance with the current interagency guidelines . . .”). Moreover, none of these independent documents are subject to challenge; they will continue to be operative regardless of the outcome of this litigation. Accordingly, any relief that Plaintiffs could receive related to the 2019 BiOp would not change the underlying management regime for nuisance grizzly bears—so will not effect Plaintiffs’ likelihood of observing a grizzly bear in the Project area.

Further, the continued operation of independently existing protections and authorizations mean that Plaintiffs’ claims are not “fairly traceable” to the 2019 BiOp. Instead, Plaintiffs seek a backdoor challenge to the 1975 4(d) Rule, the 1986 Interagency Guidelines, and the 2016 Conservation Strategy.

3. Plaintiffs’ speculation that lethal removal of female grizzlies will increase is unsupported and unwarranted.

Plaintiffs challenge the 2019 BiOp because it “places no temporal or numerical limits on the take of females within the total 72 exempted . . .” Pls.’ Mot. at 14 (ECF 15-1 at 21). Plaintiffs’ theory of harm depends upon their speculation that there will be a material upward departure from the historical average of .7 female bears or the historical high of 2 female bears lethally removed in a year. Plaintiffs do not support, and the record contradicts, this speculation.

First, depredating bears are historically more likely to be male than female. *See* Upper Green River Area Rangeland Project, Final Environmental Impact Statement at 315 (FS-PAR-010681) (Ex. E) (4 of 14 grizzlies removed from the Project area during 2010-2014 were female); Grizzly Bear Management Captures, 2019 Annual Report at 2 (FS-PAR-004239) (Ex. F) (most captures were adult males); 2019 BiOp at 11 (FS-PAR-003917) (male bears eat more meat); *Id.* at 28 (–003934) (in one study 3 males accounted for 90% of depredation); *Id.* at 43 (–3949) (transient and resident males were main chronic depredators).

Second, females are more likely than males to be effectively relocated, avoiding the need for lethal removal. 2019 BiOp at 34 (FS-PAR-003940) (after a conflict removal “sub-adult females returned the least of all groups”).

Third, as explained above, even without the 2019 BiOp, the sex of a conflict bear is considered when determining how to address and remediate conflict. 2016 Management Strategy at FS-PAR-002920 (health, age, and sex of bear will be considered in relocation or removal decisions) (Ex. D); 2016 Wyoming Grizzly Bear Management Plan at FS-PAR-002569 (“bear’s health, age and sex will be considered in any decision to identify appropriate management actions”) (Ex. B). In short, both biological and management mandates drive the historically lower number of lethal female removals when compared to male removals; Plaintiffs have provided no evidence to counter the continued impact of these mandates.

C. Plaintiffs’ Harm is not Redressable by the Relief Sought.

Finally, to demonstrate standing, Plaintiffs’ purported harms must be redressable by this Court. In explaining how an injunction would redress his harm, Mr. Christensen states, “[i]f the FWS had complied with the law and conducted the appropriate review under the ESA, it *might not* have authorized so many grizzly bears to be killed.” Christensen Decl. ¶ 19 (emphasis added). He continues, “[t]hus, if the FWS is ordered to undertake the required review, fewer grizzly bears *might be* killed as a result of the challenged grazing.” *Id.* (emphasis added). On their face, Mr. Christensen’s statements demonstrate the mere possibility that his harms could be redressed by a favorable decision by this Court. This hardly meets Plaintiffs’ heightened standard to demonstrate a substantial likelihood of standing. *See EPIC*, 878 F.3d at 377.

Plaintiffs’ purported harms are not redressable for at least three additional reasons. First, Mr. Christensen’s purported harms would continue regardless of the outcome of this suit or the relief sought. Mr. Christensen avers that the “removal of any one bear from these allotments significantly reduces my chance of viewing a grizzly [in the Upper Green River area’s

ecosystem].” Christensen Decl. ¶ 21. Mr. Christensen and Plaintiffs ignore, however, that non-lethal control of depredating grizzly bears usually results in the capture and relocation of the offending bears to remote areas. For example, in 2019, the Wyoming Game and Fish Department relocated four conflict grizzly bears from the Project area. Wyo. Game & Fish Dept., *Grizzly Bear Management Captures, Relocations, and Removals in Northwest Wyoming*, fig.1, 2 (2019) (FS-PAR-004241–4242) (Ex. F) (identified as G260, G262, 973, and 979).³ Each of these bears was relocated and released miles from the Project area. *Id.* at fig. 2. Thus, regardless of whether FWS/WGFD undertake lethal removal or non-lethal relocation, the offending bears will no longer be available for viewing in or near the Project area.

Second, lethal removal will continue to be available outside of the Project area. Significant state and private lands abut the southern portion of the Project area and private land is located inside the Project area boundary. U.S. Forest Serv., *Upper Green River Area Rangeland Project Final Environmental Impact Statement*, 2 (FS-PAR-010368) (Ex. E). The 2019 BiOp does not control the lethal removals of nuisance bears on non-federal lands outside of the Project area, and possibly does not control removals of bears on private lands within the Project area. *Id.* (authorization was for six allotments on National Forest System lands). 2019 BiOp at 23 (“the most frequent reason for management removals are conflicts on private lands”).

Third, as explained above, lethal removal is permitted by the 4(d) Rule. Bears removed for cattle depredation are often considered dangerous to humans as well. 2019 BiOp at 41 (“Grizzly bear depredation on cattle . . . will likely cause an increased potential for bear-human conflicts.”). Plaintiffs have not established that a bear lethally taken under a prior BiOp/ITS

³ Ranchers note that bear 973 was later lethally removed for continued nuisance behavior (obtaining garbage). FS-PAR-004244 (Ex. F). Thus, even if Plaintiffs obtain an injunction against the lethal removal in the Project area, relocated bears could, and have been, subsequently removed from the Greater Yellowstone population.

would not also have been eligible for take under the 4(d) Rule protection of human life. Thus, Plaintiffs' evidence fails to demonstrate a redressable harm.

II. ADDITIONAL CASES SUPPORTING THE CONSIDERATION OF ECONOMIC FACTORS IN THE WEIGHING OF THE INTERESTS

At oral argument, the court granted Ranchers' request to provide citation to additional caselaw supporting the weighing of economic factors while balancing the equities. Ranchers respectfully submit that the following cases are relevant to this issue: *N. Slope Borough v. Andrus*, 486 F. Supp. 326, 331–32 (D.D.C. 1979); *Fund for Animals, Inc. v. Turner*, No. 91–2201, 1991 WL 206232, *8 (D.D.C. Sep. 27, 1991); and *Cent. Ariz. Water Conservation Dist. v. Army Corps of Eng'rs*, No. 18 Civ. 724, slip op. at 4–5 (D. Ariz. Mar. 15, 2018).

CONCLUSION

Plaintiffs have failed to demonstrate standing under the heightened standards required at the preliminary injunction stage. Mr. Christensen's declaration fails to demonstrate any imminent, concrete injury that would result from the removal of grizzly bears from the Project area; any harm traceable to the 2019 biological opinion; or that the purported harms would be redressed by a favorable decision from this court. Accordingly, Plaintiffs' Motion for a Preliminary Injunction should be denied.

DATED this 8th day of June 2020.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 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