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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

CENTER FOR BIOLOGICAL DIVERSITY, et al., Petitioners, vs. DEBRA HAALAND, et al., Respondents, STATE of WYOMING and UPPER GREEN RIVER CATTLE ASSOCIATION, et al., Respondent-Intervenors.	Civil No. 20-CV-231-F
WESTERN WATERSHEDS PROJECT, ALLIANCE FOR THE WILD ROCKIES, and YELLOWSTONE TO UINTAS CONNECTION Petitioners, vs. DEBRA HAALAND, et al., Respondents, STATE of WYOMING and UPPER GREEN RIVER CATTLE ASSOCIATION, et al., Respondent-Intervenors.	Civil No. 20-CV-234-F

RANCHER INTERVENORS' BRIEF

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AMP	Allotment Management Plan
AOI	Annual Operating Instructions
APA	Administrative Procedure Act
AUM	Animal Unit Month
BiOp	Biological Opinion
BTNF Plan	1990 Bridger-Teton National Forest Land Resource Management Plan
CBD	Center for Biological Diversity
DMA	Demographic Monitoring Area
ESA	Endangered Species Act
FWS	Fish and Wildlife Service
GYE	Greater Yellowstone Ecosystem
IGBST	Interagency Grizzly Bear Study Team
ITS	Incidental Take Statement
NEPA	National Environmental Policy Act
NFMA	National Forest Management Act
Project	Upper Green River Area Rangeland Project
Project FEIS	2017 Final Environmental Impact Statement for the Upper Green River Area Rangeland Project
ROD	2019 Record of Decision for the Upper Green River Area Grazing Project
RZ	Recovery Zone
USFS	United States Forest Service
WWP	Western Watersheds Project

INTRODUCTION

Grizzly bears in the Greater Yellowstone Area have made a profound recovery. This recovery has occurred alongside centuries-old grazing activity in the Upper Green River Area Rangeland Project ("Project"). Nevertheless, Petitioners seek to end this vital use of Bridger-Teton National Forest lands, arguing this longstanding use of land outside the Grizzly Recovery Zone jeopardizes the entire existence of the species. This substantive allegation is contradicted by history and data. Moreover, none of Petitioners' procedural objections to FWS's 2019 BiOp and USFS's approval of the Project carry water.

Separately, Petitioner Western Watersheds Project ("WWP") asserts that the Forest Service failed to comply with the National Forest Management Act ("NFMA"). In particular, WWP claims the Forest Service's allowance of grazing did not provide for suitable and adequate forage at the expense of sensitive amphibians and migratory birds. The Forest Service properly considered multiple uses, adhered to the 1990 Bridger-Teton National Forest Land Resource Management Plan's ("BTNF Plan") specific forage levels, and should be given deference when interpreting terms in the BTNF Plan.

BACKGROUND

Livestock grazing is essential to the well-being of the United States in general and of Wyoming in particular. "Livestock grazing is among the oldest land uses in Bridger-Teton National Forest with the majority of local ranches dependent upon on the National Forest for summer forage." NFMA-FS-SAR-44. Indeed, over 200 ranchers depend on the Forest's summer ranges. NFMA-FS-SAR-77. For example, without a grazing permit, the Sommers Ranch Partnership "would not remain an economically viable operation and would have to sell [the] ranch." NFMA-FS-SAR-2612 (Feb. 19, 2000 Sommers Letter).

It's not just ranchers. Entire communities depend on the availability of Forest lands for grazing. *See, e.g.,* FS-PAR-8386 (2016 Upper Green River Area Rangeland Project, Social and Economic Resource Report) ("Domestic livestock grazing within and adjacent to the project area has played a key role in sustaining the vitality of Pinedale, Big Piney, and the surrounding communities since the early 1900s."); NFMA-FS-SAR-77 ("Ranching, farming, and associated agri-business are some of the most

important factors in the economy of western Wyoming. Some of the smaller communities are almost totally dependent upon the agricultural economy.").

Over a century ago, the Forest Service developed the livestock grazing allotment system in the Project area. NFMA-FS-SAR-59111 (Project FEIS). The northern and western borders of the Upper Green River Allotment were fenced in 1910. FS-PAR-8389 (2016 Social and Economic Resource Report). Intervenor-Respondent Upper Green River Cattle Association was formed in 1916. NFMA-FS-SAR-2612.

In return for the opportunity to put Forest grazing areas to socially beneficial use, Intervenors have been model citizens and stewards of the land and of grizzlies, working "very cooperative[ly] . . . with the Forest Service to improve range conditions on their allotments." NFMA-FS-SAR-571. In 2013, for example, an Environmental Coordinator for Forest Service noted that permittees had not merely "been compliant over the last five years," but that moreover:

> their compliance is a consistent pattern over the years. . . . [P]ermittees have be[en] compliant with the grizzly bear conservation measures and terms and conditions of the B[i]O[p] and are proactive managers of their allotments, working cooperatively with the Forest Service to address any resource concern as it arises. The Upper Green River Allotment permittees are also involved in a cooperative monitoring program with the Forest Service since 1996.

NFMA-FS-SAR-2915.

Ranching, like every industry, has become subject to increasing regulation and changed management practices. As a result, grazing permitted on the Bridger-Teton National Forest has declined notably over time. The BTNF Plan indicated that the Forest provided over 253,000 animal unit months ("AUMs") of forage in the mid-1980s, while a 2016 report noted that the Forest then authorized only approximately 180,000 AUMs. NFMA-FS-SAR-66 (1985 AUM output for Forest was 253,3000); NFMA-FS-SAR-1219 (defining AUM as the "amount of forage required by a [mature cow] for one month"); NFMA-FS-SAR-42785 ("Forest currently authorizes approximately 180,000 AUM's"). In other

words, the Forest currently provides over 70,000 fewer months of cattle forage than 30 years ago, an almost 30 percent reduction.

LEGAL BACKGROUND

Grazing on national forest land is governed by a bevy of statutes and regulations, including the Endangered Species Act, the National Forest Management Act, and the Administrative Procedure Act.

I. The Endangered Species Act

When a species is listed as endangered or threatened under the Endangered Species Act ("ESA"), all federal agencies are charged with ensuring that their actions are unlikely to jeopardize the species or to destroy or adversely modify its designated critical habitat. 16 U.S.C. § 1536(a)(2). If a proposed action might affect the species, ESA Section 7 requires that the agency proposing action (the "action agency"—here, USFS) consult with the "consulting agency" responsible for management of the species (here, FWS) to determine whether the action is likely to jeopardize the existence of the species. The 2019 BiOp is the document produced by FWS to explain its determination (referred to below as the "no-jeopardy determination") that the action proposed by USFS—approving the Upper Green River Allotment Grazing Plan—was not likely to jeopardize the existence of the grizzly bear, which is listed as "threatened." Section 9 of the ESA generally prohibits "taking" of a covered species, where to "take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" the animal. 16 U.S.C. § 1532(19). However, take that is incidental to a federal action may be exempted from the prohibition by an incidental take statement ("ITS") issued with a BiOp produced from the consulting process. 16 U.S.C. §§ 1536(b)(4), 1536(o)(2).

II. The National Forest Management Act

The National Forest Management Act ("NFMA") requires the Forest Service to develop management plans for its forests and then evaluate projects occurring on a forest against the applicable forest plan. *See* 16 U.S.C. §§ 1604(a); 1604(i). Forest plans must consider "physical, biological, economic,

and other sciences," and "shall" provide for "multiple use and sustained yield of the products and services" obtained from the forest, coordinating range, timber, wildlife, and other products and uses. 16 U.S.C. §§ 1604(b), 1604(e). The Tenth Circuit has repeatedly described a forest plan as "a broad, programmatic document." *Colo. Envt'l Coal. v. Dombeck*, 185 F.3d 1162, 1167–68 (10th Cir. 1999) *quoted in McKeen v. U.S. Forest Serv.*, 615 F.3d 1244, 1247 (10th Cir. 2010).

NFMA requires site-specific projects (plans, permits, contracts) to "be consistent with" the applicable forest plan. *See* 16 U.S.C. § 1604(i). The dispute here turns on several factors, including (1) how to determine if a project is "consistent with" a plan that has multiple competing economic and biological goals, (2) the level of legal force to be accorded to plan goals, and (3) the level of deference owed to the Forest Service when making such determinations and reconciliations. *See* WWP Br. at 11, 31–37 (ECF No. 133); Fed. Br. at 13, 45–53 (ECF No. 141).

When evaluating these disputes, it is important to note that WWP's "Legal Background" errs in its characterization of both NFMA's requirements and the BTNF Plan. Specifically, WWP's citation to *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1110 (9th Cir. 2018), for the contention that "[p]lan standards are binding and require strict compliance," is not applicable and potentially misleading. WWP Br. at 11. The Ninth Circuit had revised its opinion in that case. The court originally cited 36 C.F.R. § 219.15 when discussing NFMA requirements. *All. for the Wild Rockies*, 907 F.3d at 1109 n.1. That regulation states that a project is consistent with a plan when the project "complies with" applicable standards. 36 C.F.R. § 219.15(d)(2). The court later recognized, however, that such regulation was not applicable to the 2003 plan at issue in that case because the plan had been developed in accordance with 1982 regulations. *All. for the Wild Rockies*, 907 F.3d at 1109 n.1. The 1990 BTNF Plan at issue in this case is likewise not subject to post-plan regulations purporting to define terms or effects of later plans.

III. The Administrative Procedure Act

Citizen claims under the ESA or NFMA are reviewed under the Administrative Procedure Act ("APA"). *See Ctr. for Native Ecosystems v. Cables*, 509 F.3d 1310, 1320 (10th Cir. 2007). Under the APA, courts set aside agency action only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Review "is highly deferential" to the agency. *Ecology Ctr. v. U.S. Forest Serv.*, 451 F.3d 1183, 1188 (10th Cir. 2006). The burden of proof rests with the party challenging agency action. *Colo. Health Care Ass'n v. Colo. Dep't of Social Servs.*, 842 F.2d 1158, 1164 (10th Cir. 1988). The inquiry focuses on the decisionmaking process, rather than the substantive outcome of the decision. *Colo. Wild v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006). The court may not weigh the evidence or substitute its own judgment for that of the agency's, even if a different choice would be fully justified. *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1030 (10th Cir. 2001); *Gallegos v. Lyng*, 891 F.2d 788, 795 (10th Cir. 1989).[1]

ARGUMENT

I. The 2019 Biological Opinion Complies with the ESA.[2]

A. The absence of a female-specific take limit in the 2019 BiOp is not arbitrary and capricious.

Petitioners' primary objection to the 2019 BiOp is that its Incidental Take Statement is not broken down by sex. CBD Br. at 19–20. Petitioners object on both procedural and substantive grounds, arguing both that (a) the absence of a female-specific take limit is an unexplained change from established agency practice, and (b) that the absence of a female-specific take limit is itself substantively unlawful, because

[1] Like Federal Respondents, Fed. Br. at 7, Rancher Intervenor-Respondents object to Petitioners' effort to supplement the record with their declarations, and reserve the right to move to strike the relevant portions of Petitioners' declarations.

[2] Rancher Intervenor-Respondents respond here to Petitioners' claims regarding grizzly bears. With regard to WWP's additional allegations concerning the Kendall Warm Spring Dace, Rancher Intervenor-Respondents adopt Federal Respondents' and Wyoming's arguments. *See* Fed. Br. at 31–37; Wy. Br. at 8, 23-24.

it renders the no-jeopardy determination unreasonable. CBD Br. at 19–26. Both of these claims rest on misunderstandings of the 2019 BiOp and the relevance of female grizzly mortality within the Project area.

Petitioners argue that because FWS had in the past included a female-specific take limit, the absence of a female-specific limit in the 2019 BiOP represents an unexplained change from established agency practice. CBD Br. at 20. But they are wrong on both counts: there was no such established agency practice, and the 2019 BiOp would not represent a change if there were. Petitioners' contention that FWS established a practice of including female-specific take limits relies on their misrepresentation of past BiOps. The 1999 Biological Assessment did not, as Petitioners suggest, impose a limit on female take; rather, it described the take anticipated, and required renewed consultation if female take exceeded the anticipated amount, because such an excess would "represent[] new information." FS-14–16. Nor did incidental take statements in the 2011 BiOp or 2014 BiOp include female-specific limits. FWS-80–115, 209–272. The 2013 supplement to the 2010 BiOp did limit female take specifically, but a single example in the midst of numerous contrary examples does not constitute an "established procedure." *See Cotton Petroleum Corp v. U.S. Dep't of Interior*, 870 F.2d 1515, 1526 (10th Cir. 1989), cited by WWP Br. at 15. Nor does it establish a practice any deviation from which is equivalent to failure to follow the agency's "own regulations, procedures, or precedents," *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002), cited by WWP Br. at 15. And it certainly doesn't establish a practice any deviation from which is equivalent to "rescinding a rule[.]" *Motor Vehicles Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30 (1983), cited by CBD Br. at 20.

Even if such a practice had been established, the 2019 BiOp would not materially deviate from it because the 2019 BiOp *does* discuss and rely on the specific mortality limits for female grizzlies. FWS-677–78, 689–90, 703–04, 706. FWS noted that removals "are considered on a case-by-case basis but follow standard protocols in the Interagency Grizzly Bear Guidelines" and that "data demonstrate that management removals of a limited number of grizzly bears on these and other Allotments have not had

detrimental impacts on the GYE grizzly bear population." FWS 704–05. The 2019 BiOp does not rely on female take limits specific to the Project Area, but that's because such limits are irrelevant unless they cause population mortality at the larger GYE scale to reach unacceptable levels. If that happens, as the 2019 BiOp notes, the IGBST will convene and develop a new review. FWS-6888–89 (2017 Supplement to Recovery Plan). *See also Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, 807 F.3d 1031, 1046 (9th Cir. 2015) (holding measures sufficiently enforceable under ESA where BiOp required reinitiating consultation if measures or stipulations unmet). But there's no reason to think it will, as the GYE population has achieved and maintained recovery goals while grazing has been ongoing. *See* Fed. Br. at 17–18.

Petitioners counter FWS's analysis with the bald assertion that "[w]ithout a limit on take of female bears, the 2019 BiOp cannot ensure against jeopardy." CBD Br. at 20. They cite no authority or data in support of this assertion, which is directly contrary to FWS's reasoned conclusion that removal of a limited number of bears has not had detrimental impacts on the GYE population, and thus will not jeopardize the survival of the species. FWS-696. Even if Petitioners had some contrary evidence, a reviewing court may not "displace the agencies' 'choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.'" *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1030 (10th Cir. 2001) (citation omitted). Nor may it "weigh the evidence nor substitute [its] discretion for that of the agency." *Gallegos v. Lyng*, 891 F.2d 788, 795 (10th Cir. 1989).

B. The 2019 BiOp addresses mortality (including female mortality) within and outside the Project area.

WWP invokes the "sink habitat" designation for the Project area as a talismanic phrase foreshadowing the doom of the species. WWP Br. at 9, 16. But the existence of a sink habitat is not dispositive of anything; the phrase merely denotes any area in which deaths exceed births and emigration exceeds exmigration. FWS-4299. Sinks are generally "associated with human activity and development," FWS-4297, but a source-sink dynamic exists "across the GYE," with positive growth rates tending to

occur inside the RZ and negative rates outside the RZ. FWS-4299. Good management involves encouraging bears to choose source habitats over sink habitats, FWS-4299, in order to "ensure that mortality . . . does not result in a population decline in source habitat," FWS-4300. But as bears become over-concentrated in source habitats, some will inevitably drift to sink habitats. FWS-4299 ("Animals move from source to sink habitats either because of density-dependent competition or density-independent dispersal."). Bear drift into sink habitats thus inevitably accompanies successful recovery efforts. As Petitioners acknowledge, not all the grazing areas are sink habitats. WWP Br. at 16. Nor are all sink habitats grazing areas. FS-6131, Fig. 5. The fact that allotments are a sink habitat makes them *more* suitable, not less suitable, for socially productive uses other than recovery; source habitats are source habitats because bears are better off being there than in sink habitats, which are relatively unsuitable. Removal of bears from the Project area is *not* why the Project area is largely sink habitat; in fact, conflict bears have specifically *excluded* from source-sink population analysis, because they form a biased sample. *See, e.g.,* FWS-185. As grazing in the Project area has decreased, conflicts have increased, because conflicts are not a function of grazing, but of the expanding grizzly population. FWS-691 ("Grizzly bears continue to expand outward in the GYE, including and beyond the action area."), 703 ("We believe this trend [increasing conflicts] was due to a growing bear population[.]"), 704 (conflicts increasing "as the number of bears using the core habitats have reached capacity").

Bizarrely, WWP complains not only that FWS relied on GYE-wide population measures instead of merely the Project area, but that FWS focused *too much* on mortality within the Project area. WWP Br. at 16–17. But WWP's own case supports FWS's analysis. In *Mayo v. Jarvis*, 177 F. Supp. 3d 91 (D.D.C. 2016), the court noted that if FWS relied on GYE-wide mortality limits, it might need to explain whether the incidental take authorized would "affect[] the GYE-wide mortality limits on which the agency has relied." *Id.* at 141 n. 41. But that's exactly what FWS did here, when it concluded that "[t]he anticipated level of grizzly bear mortality caused by the proposed action falls within the scope of the demographic

recovery criterion to maintain the population within the DMA . . . by maintaining annual mortality limits," and "[t]he level of mortality that will occur because of this Project will not appreciably reduce the overall population, reproduction, and distribution of grizzly bears in the GYE recovery area." FWS-706. FWS also noted that "data demonstrate that management removals of a limited number of grizzly bears on these and other Allotments have not had detrimental impacts on the GYE grizzly bear population." FWS-705. In *Mayo*, the court remanded for failure to consider the environmental baseline; here, FWS thoroughly considered the baseline. *Compare Mayo*, 177 F. Supp. 3d at 137–39 *with* FWS-26–38. Contrary to WWP's contention, "nothing in the statute or regulation requires the FWS to rigidly add up each incidental take" if it "take[s] the baseline seriously and make[s] a concerted effort to evaluate the impact of [its] proposed action against that backdrop." *Mayo*, 177 F. Supp. 3d at 138, quoting *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 230 (D.D.C. 2005).

C. The 2019 BiOp properly considers and uses conservation measures.

Petitioners object to the conservation measures included in the 2019 BiOp, arguing that FWS arbitrarily and capriciously relied on those measures to support its no-jeopardy determination, because various measures are vague, not certain to occur, unenforceable, and ineffective. CBD Br. at 21–26. Petitioners' arguments about vagueness, uncertainty, and unenforceability fail for two reasons: first, because the relevant measures are not vague, uncertain, and unenforceable; second, because Petitioners misunderstand the requirement at issue. Petitioners' arguments regarding ineffectiveness are unsupported by the record and merely seek impermissibly to substitute their own judgment for that of FWS.

Generally, Petitioners misinterpret standards a conservation measure must meet to be *sufficient* to support a no-jeopardy determination instead as a ban on conservation measures that do not meet those standards, even if the conservation measures at issue are not necessary to the no-jeopardy determination. But there is no such ban. Petitioners rely primarily on *Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139 (D. Az. 2002), which dealt with "a laundry list of possible mitigation measures" essential

to the no-jeopardy finding, all of which were "merely suggestions." *Id.* at 1153. There, the no-jeopardy determination was premised on the hope that the agency and other interested parties would come up with a mitigation plan in the future. *Id.* at 1154. Here, by contrast, there is no indication that the conservation measures included in the 2019 BiOp were essential to its no-jeopardy determination. *Compare* FWS-706 (noting FWS "*review[ed]* . . . the Forest's commitment to implement their Conservation Measures" (emphasis added)) *with* FWS-706 ("The Service reached [its] conclusion by considering the following: [listing only factors *not* including conservation measures]"). *See also Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 743 ("Binding mitigation measures cannot refer *only* to generalized contingencies or gesture at hopeful plans[.]" (emphasis added)).

In *Bernhardt*, on which Petitioners also rely, CBD Br. at 22, the court determined that the mitigation measures FWS included in its BiOp were insufficiently specific to enforce. *Bernhardt*, 982 F.3d at 743 (although the court noted that "measures can be made enforceable in a variety of ways, including by incorporation into the terms and conditions of an incidental take statement"). It also held, however, that its "conclusion that the mitigation measures in the BiOp are insufficiently specific to enforce has no legal consequence unless we separately conclude that FWS relied on those measures." *Bernhardt*, 982 F.3d 723, 747 (9th Cir. 2020). And in fact, the court proceeded to find that FWS had not relied on those measures in its no-jeopardy determination. *Id.* at 748. By contrast, the court determined that FWS *had* relied on those measures for its critical habitat determination, because FWS specifically relied on its finding that the "terms and conditions associated with authorizations under the MMPA [("Marine Mammal Protection Act")] would minimize the level of persistent disturbance that may result from the Proposed Action[.]" *Id.* at 748.

To the extent any of the 2019 BiOp measures are unenforceable or uncertain, this case is like *Bernhardt*, not *Rumsfeld*, because the no-jeopardy determination of the 2019 BiOp plainly does not hinge on (for instance) whether Conservation Measure 7 (requiring USFS to "Continue to identify and

implement opportunities that reduce the potential for grizzly bear conflicts") or Conservation Measure 9 (requiring that USFS "Continue to work in cooperation with [agencies] to identify and collect information") successfully results in unspecified future mortality reductions. FWS-706. These are "and don't stop there!" provisions requiring USFS to engage in ongoing efforts at improvement. There is no indication in the record that FWS's no-jeopardy determination relies on future identification of yet-unknown measures merely because it requires USFS to continue efforts to identify such potential additional measures. Petitioners perversely seek to turn a requirement for concrete conservation measures into a ban on FWS's requiring ongoing identification of potential additional or improved conservation measures.

In any case, most of Petitioners' objections to the Conservation Measures are dependent on mischaracterizing those measures.

Petitioners argue that Measure 2, which requires riders to watch livestock closely for sick, injured, or stray animals, "relies upon the uncertain actions of permittees," CBD Br. at 23. But Measure 2 literally uses the word "required." FWS-667. CBD complains (at 23) that Measure 2 fails to define "closely," claiming it "leav[es] this up to the broad discretion of permittees," but any discretion bestowed by Measure 2 to determine what constitutes "watch[ing] all livestock closely" is bestowed on *USFS*, not its permittees. FWS-667 ("Riders are required to watch all livestock closely…").

Petitioners argue that Measure 3 is not "reasonably specific" because it requires monitoring on a regular basis and does not define those terms. CBD Br. at 23. But there is nothing unreasonable about requiring regular monitoring without creating an inflexible date-specific schedule. FWS-667.

Petitioners argue that Measures 4 and 5 are ineffective because they are illusionary or aspirational, CBD Br. at 25–26, but acknowledge that if the "measures actually required removing carcasses from allotments or destroying them, they would likely increase grizzly bear survival." *Id.* at 25. But as Federal Respondents explain at length, Fed. Br. at 28–30, Measures 4 and 5 *do in fact* require removal or

destruction of carcasses; Petitioners have thus effectively conceded these measures' efficacy. FWS-667 ("all carcasses . . . *will be removed* if possible" (emphasis added)).

Petitioners specifically object to the exceptions provided in Measures 4 and 5 for impossibility and for human safety. CBD Br. at 24–25. But a requirement to do something impossible *would* be ineffective and unenforceable by definition. And while Petitioners may believe human safety is an illegitimate consideration, "Congress has not . . . elevate[d] species protection over the health and safety of humans." *Consol. Salmonid Cases*, 713 F. Supp. 2d 1116, 1169 (E.D. Cal. 2010), supplemented (June 1, 2010). *See also Red Wolf Coal. v. U.S. Fish and Wildlife Serv.*, 346 F. Supp. 3d 802, 815 (E.D.N.C. 2018) (court-approved exception allowing taking of protected wolves when they "are a threat to human safety").[3]

Petitioners argue that Measure 6 is a "voluntary measure" that simply "recommend[s] that permittees and their representatives carry bear spray," but this is a mischaracterization of Measure 6. CBD Br. at 22 (quoting FWS-668). Measure 6 is not voluntary; it is a binding requirement on *USFS* that it recommend bear spray to permittees. FWS-668 ("The Forest will recommend that all permittees…").

Petitioners assert that Measures 7–9 do nothing to protect bears. CBD Br. at 25. Petitioners' objection to Measure 8, which requires that USFS will make grazing permittees aware of their legal obligations, is particularly strange; why would Petitioners *not* want USFS to be required to inform permittees of their obligations under the ESA? *See Id.*; FWS-668. *See also supra* at __ (discussing Measures 7 and 9).

In sum, none of the Conservation Measures are legally objectionable in and of themselves, and the fact that certain measures (such as measures 7 and 9) would not standing alone be sufficient to support a

[3] CBD speculates that conservation measures are irrelevant because "past issues with compliance" mean that USFS cannot be trusted to enforce them. CBD Br. at 17. CBD cites exactly *one* example of noncompliance with grazing restrictions: a letter from USFS *canceling a permit* for noncompliance with grazing restrictions when a (now former) permittee could not demonstrate ownership of otherwise lawfully grazing cattle. FS-8568. Setting aside that this is a citation to the wrong record, not the record that was before FWS, a single example of vigorous enforcement is not evidence that noncompliance is common, and it's certainly not evidence that USFS cannot be trusted with enforcement—quite the contrary.

no-jeopardy determination does not render the no-jeopardy determination unlawful. Any contrary holding would simply require FWS to exclude marginal conservation measures in future BiOps, because it would effectively bar inclusion of any measure that could not on its own justify a no-jeopardy finding.

II. Even If the 2019 BiOp Had Been Flawed, the Forest Service Properly Relied on It.

"[R]eviewing the decision of an action agency to rely on a BiOp . . . is quite different than . . . reviewing a BiOp directly." *City of Tacoma, Washington v. FERC*, 460 F.3d 53, 75 (D.C. Cir. 2006). While reliance on a BiOp can be arbitrary and capricious if the BiOp is "facially flawed" or the action agency "blindly adopt[s] the conclusions of the consultant agency," nevertheless "the action agency need not undertake a separate, independent analysis of the issues addressed in the BiOp." *Id*. at 75 –76 (cleaned up). "In fact, if the law required the action agency to undertake an independent analysis, then the expertise of the consultant agency would be seriously undermined." *Id*. An agency's reliance on a BiOp is lawful "if a challenging party can point to no 'new' information—*i.e.*, information the [consultant agency] did not take into account—which challenges the opinion's conclusions." *Id.* at 76 (alteration in original), quoting *Pyramid Lake Paiute Tribe v. U.S. Dep't of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990). Petitioners point to no such information here, and do not claim that the BiOp was facially flawed. Rather, they assert that it's categorically arbitrary and capricious to rely on a BiOp later determined to be arbitrary and capricious. CBD Br. at 26. That is not the law. *City of Tacoma*, 460 F.3d at 75–76.

CBD also asserts that the Forest Service cannot rely on requirements it imposes on permittees to support a no-jeopardy determination, CBD Br. at 26–27, but no authority has held anything so absurd; *any* conditional no-jeopardy determination for a project involving third party action will necessarily depend on requirements imposed on those third parties. A requirement that measures relied upon to support a no-jeopardy finding be enforceable would be incoherent if agencies could not impose those measures on third parties with the threat of enforcement action. CBD cites only *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987), for the proposition that USFS cannot consider conditions it imposes on permittees; *Marsh*, of course, says nothing of the sort. In *Marsh*, the action agency's no-jeopardy determination relied on

proposed actions not required by the agency by a third party not subject to enforcement action by the agency, and in fact depended on the outcome of undecided collateral litigation. *Id.* at 1385–86. *See also Cal. Native Plant Soc'y v. Norton*, No. 01CV1742 DMS (JMA), 2004 WL 1118537, at *10 (S.D. Cal. Feb. 10, 2004) (specifically rejecting "the proposition that the Service may not rely on voluntary actions of third parties in conducting a Section 7 analysis" and distinguishing cases where USFS is bound).

III. The Project Complies with NFMA.

WWP's NFMA claim rests on multiple false premises. WWP's argument would require the Court to find that an aspirational "objective" in the BTNF Plan is actually an enforceable "standard," and to hold that one BTNF Plan "objective" is more applicable, important, and enforceable than all others. WWP cannot carry its burden to establish either premise; its conclusion must therefore fail.

Additionally, WWP's arguments that the Project does not ensure "suitable and adequate amounts of forage and cover" disregard the deference afforded to the Forest Service's technical expertise and need to balance competing mandates, policies, and goals, including the goal of facilitating grazing. Finally, the forage utilization limitations in the Project documents, including the utilization standard for Idaho fescue, provide "suitable and adequate" cover for amphibians and migratory birds. The Project is consistent with the BTNF Plan, WWP has not proven any NFMA violation, and WWP's petition should be denied.

A. The Project documents are consistent with the 1990 BTNF Plan regarding forage utilization.

The Project documents meet or exceed the Forage Utilization Standard in the BTNF Plan. As explained above, NFMA requires the Forest Service to devise a management plan for each forest unit and then requires that any projects approved to take place on the forest be consistent with the plan. *See* 16 U.S.C. §§ 1604(a); 1604(i); *See also Utah Native Plant Soc'y v. U.S. Forest Serv.*, 923 F.3d 860, 868 (10th Cir. 2019). In this case then, the Upper Green River Area Rangeland Project must be consistent with the BTNF Plan, and it is.

WWP's refrain is that "USFS has not ensured" that the Project documents "compl[y] with the Forage Utilization Standard" in the BTNF Plan, thus "the ROD and AOIs must be set aside." *See* WWP Br. at 32, 33, 36, 37. A quick review of the documents proves otherwise.

The Forage Utilization Standard in the BTNF Plan states:

> **Forage Utilization Standard** — The following utilization standards will be maximum utilization levels allowed for all herbivores on key vegetative species For further information, see *Range Analysis and Management Handbook, FSH 2209 14 Chapter 4*
>
> **Upland Range Sites**
>
> | *Season-Long Grazing | | Rotation Grazing | |
> |---|---|---|---|
> | Unsatisfactory Condition | Satisfactory Condition | Unsatisfactory Condition | Satisfactory Condition |
> | 40% | 50% | 50% | 60% |
>
> **Riparian Range Sites**
>
> | *Season-Long Grazing | | Rotation Grazing | |
> |---|---|---|---|
> | Unsatisfactory Condition | Satisfactory Condition | Unsatisfactory Condition | Satisfactory Condition |
> | 45% | 55% | 55% | 65% |
>
> *Season-long grazing only exists on a few allotments and will be changed to rotational grazing as Allotment Management Plans (AMPs) are revised

NFMA-FS-SAR-133–34. In other words, for an upland range site subject to season-long grazing and in unsatisfactory condition, only 40% utilization will be permitted. In contrast, for a riparian range site subject to rotational grazing and in satisfactory condition, up to 65% utilization will still comply with the BTNF Plan.

As an initial matter, the ROD eliminated any season-long grazing in the Project. *See* NFMA-FS-SAR-62844; NFMA-FS-SAR-62830; NFMA-FS-SAR-59110 (the Project FEIS elected Alternative 3 as the preferred option); NFMA-FS-SAR-59115 (under Alternative 3 in the Project FEIS, "[t]he Forest Service would initiate a deferred or rotational grazing system in the Badger Creek, Beaver-Twin Creeks, Roaring Fork and Wagon Creek allotments to meet Forest Plan requirements to eliminate season long grazing[]"); NFMA-FS-SAR-2612 (a letter from Albert Sommers, Jr., of Sommers Ranch Partnership in

2000, stating his family has implemented "rest-rotation and deferred grazing systems" for nearly 30 years on the Upper Green River Allotment—in present day that would be nearly 50 years of rest-rotational and deferred grazing).

Further, the Project FEIS stated that, "[i]n general, the upland areas in the Upper Green River project are in satisfactory condition with a few localized areas of concern described below which comprise a relatively small portion of the project area." NFMA-FS-SAR-59160. The Project FEIS identifies seven "focus areas" that "do not currently meet desired conditions..." NFMA-FS-SAR-59114.

Thus, while the BTNF Plan would allow 60% utilization for most upland areas in the Project and 65% utilization in many riparian areas, the ROD took a more conservative approach, generally allowing only 50% utilization.[4] NFMA-FS-SAR-62823–27 (site-specific utilization rates ranging from 20% to 65%). These conservative utilization standards are carried into the grazing permits (one for each permittee) and AOIs, making them more conservative than, and hence compliant with, the Forage Utilization Standard in the BTNF Plan. For example, a 2021 permit for the Upper Green River Allotment states:

12. UTILIZATION STANDARDS AND GUIDELINES established by Upper Green River FEIS ROD:

A. Vegetation Range Prescription: Range is managed to maintain and enhance range and watershed condition.

B. Forage Utilization Standard for Upland: 50%

C. Forage Utilization Standard for Riparian: 50%

D. Greeenline Stubble heights shall range from 4"-6" as identified in the ROD.

E. The maximum forage utilization guidelines apply cumulatively to all types of grazing use including wildlife, livestock, and recreational stock.

F. During monitoring and evaluation a Utilization Guideline may be changed if the prescribed level is not accomplishing planned objectives.

NFMA-FS-SAR-63493. The site-specific limitations are also restated in the respective AOIs:

[4] While utilization of up to 65% is allowed in some areas of the Noble Allotment pastures and its respective separate permit and AOI, these pastures are controlled by additional site-specific guidelines. Noble Pasture 1 is the only pasture with a permanent 6-inch stubble height requirement for the riparian greenline. NFMA-FS-SAR-62823–27. Noble Pasture 1 also includes a focus area subject to a permanent 6-inch stubble height. *Id*. The focus area in Noble Pasture 4 is the only pasture with a limitation providing that it "would be grazed at a maximum forage utilization of .5 AUMs per acre per year and likely would not be grazed some years." NFMA-FS-SAR-62824.

> Additionally, the Upper Green River Grazing EIS record of decision was signed in 2019. Therefore, we will begin implementing that decision and utilization levels will not exceed 50% in uplands/riparians and greenline stubble heights of 4" and 6" shall be maintained dependent on the site as identified in the ROD.

NFMA-FS-SAR2-64538 (AOI for Upper Green River Allotment).

In short, the ROD, the permits, and the AOIs are consistent with the quantified Forage Utilization Standard in the BTNF Plan, and WWP has not shown otherwise.

B. The Forage Utilization Standard in the 1990 BTNF Plan Does Not Convert All Plan Objectives to Part of the Standard.

Untroubled by the plain, logical interpretation of the Forage Utilization Standard, WWP's argument assumes that this Standard incorporated BTNF Plan objectives, converting them from objectives to standards. This argument misconstrues one sentence in the BTNF Plan and ignores the definitions, context, and text of the rest of the BTNF Plan.

After the quantified utilization standards according to range site, condition, and grazing practice are set forth in the Forage Utilization Standard, the BTNF Plan states:

> During AMP revision, the Interdisciplinary (ID) Team and livestock permittees will prescribe site-specific utilization levels needed to meet Forest Plan objectives

NFMA-FS-SAR-134. WWP claims that this made the "Forest Plan objectives" part of the Forage Utilization Standard. Specifically, WWP argues that standards are binding, the BTNF Plan includes the Forest Utilization Standard, and that Standard "requires that during AMP revision, site specific forage utilization levels be prescribed to meet BTNF Plan objectives." WWP Br. at 11. WWP continues its boot-strapping, arguing that the objectives "most notably" include Objective 4.7(d), "requir[ing]" suitable and adequate amounts of forage and cover for wildlife and fish. *Id.* Taking it as a given that the Project is therefore "required" to meet this BTNF Plan objective, WWP proceeds to fault the Project FEIS because it "does not say any action alternative *meets*" Objective 4.7(d), and the ROD because it "does not explain how the selected alternative complies with the Forage Utilization Standard's requirement that site-specific utilization levels meet BTNF Plan objectives." *Id.* at 16, 19. WWP concludes each of its NFMA arguments

stating that the ROD "fails to require the retention of suitable and adequate amounts of cover," therefore not complying with the Standard and violating NFMA. WWP Br. at 32, 33, 36, 37.

WWP's argument is wrong for a host of reasons. First, the language WWP cites, by its clear terms, only applies "[d]uring AMP revision." NFMA-FS-SAR-134. Nowhere does WWP mention any language from the two AMPs created since the BTNF Plan, let alone address whether those AMPs meet the BTNF Plan objectives. WWP also does not explain why this BTNF Plan statement would apply to allotments with pre-existing, unrevised AMPs or allotments that do not have AMPs.

Second, the BTNF Plan specifically defines both "Standard" and "Objective":

> **Standard** — A land, resource, or human-use value against which organizational actions or resource conditions can be measured and limited, and usually stated as requirements in this document using the term "will be"
>
> **Objective** — Accomplishment steps or points designed to achieve a goal
>
> **Goal** — The desired end result

NFMA-FS-SAR-11, -10. There is simply no basis for WWP's apparent theory that Forest Plan "objectives" became part of the Forage Utilization Standard merely because the statement about meeting BTNF Plan objectives was placed after the Forage Utilization Standard.

Third, there is also no basis for WWP's theory that the only "objective" incorporated into the Forage Utilization Standard was Objective 4.7(d). The Plan includes no less than 48 explicit objectives, including the objective of providing forage for about 260,000 AUMs of livestock grazing annually. NFMA-FS-SAR-118-127; NFMA-FS-SAR-119 (Objective 1.1(h)). The BTNF Plan also includes dozens of goals and standards. NFMA-FS-SAR-118–27 (listing goals and objectives); NFMA-FS-SAR-127–50 (listing standards).

WWP's entire theory depends upon the Forage Utilization Standard incorporating Objective 4.7(d) to the exclusion of or as a priority over Objective 1.1(h) and every other objective, but nowhere does WWP explain why this is a justifiable legal conclusion. Despite WWP's desire to abolish grazing, the

BTNF Plan requires the Forest Service to "[p]rovide forage for about 260,000 Animal Unit Months (AUMs) of livestock grazing annually" just as much as it requires adequate forage and cover. *See* Western Watersheds Project, https://www.westernwatersheds.org/ (last visited Jan. 19, 2022) (website states, "[t]ogether we can protect western public lands from the *destructive effects of livestock* grazing[]" (emphasis added)); NFMA-FS-SAR-119; NFMA-FS-SAR-42785 ("[T]he Forest currently authorizes approximately 180,000 AUMs.").

C. The Forest Service is entitled to deference, and properly provided for "suitable and adequate" forage.

Even if "suitable and adequate" forage and cover were required, the Forest Service is entitled to deference in interpreting Objective 4.7(d). *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005) ("Agencies are entitled to deference to their interpretation of their own regulations, including Forest Plans."); *Bark v. Northrop*, No. 3:13-cv-00828, 2016 WL 1181672, at *16 (D. Or. Mar. 25, 2016) ("Where a forest plan directive is susceptible to more than one meaning, the Forest Service's interpretation and implementation of its own plan is afforded substantial deference unless plainly erroneous."); *Sierra Club v. Martin*, 168 F.3d 1, 4 (11th Cir. 1999) (stating that "the Forest Service's interpretation of its Forest Plan should receive great deference from reviewing courts" unless the Forest Service does not "scrupulously follow the regulations and procedures promulgated by the agency itself[]" (cleaned up)).

WWP keys in on Objective 4.7(d): "[r]equir[ing] that suitable and adequate amounts of forage and cover are retained for wildlife and fish[.]" NFMA-FS-SAR-126. As mentioned previously, the BTNF Plan contains over 100 goals, objectives, and standards. NFMA-FS-SAR-118–27 (listing goals and objectives); NFMA-FS-SAR-127–50 (listing standards). Naturally then, "[t]he Forest Plan recognizes that *not all the Forest Plan goals and objectives can be achieved at the same time* from the same land areas." NFMA-FS-SAR-59173 (emphasis added). The resulting needed balancing necessarily depends on exercise of discretion by the Forest Service.

Forest Plans "appear more akin to 'road maps' on which the Forest Service relies to chart various course of action. A [Forest Plan] is, in the truest sense, a document that creates a *vision* by integrating and displaying information relevant to the management of a national forest." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1155 (10th Cir. 2007) (emphasis in original); *Id.* ("In short, [Forest Plans] are a framework for making later project decisions rather than . . . a collection of project decisions.") (citation and quotation omitted). Forest Plans "'operate like zoning ordinances, defining broadly the uses allowed in various forest regions, setting goals and limits on various uses . . . but [the plans] do not directly compel specific actions[.]'" *Conservation Cong. v. U.S. Forest Serv.*, No. 07-2764, 2010 WL 3636142, at *3 (E.D. Cal. Sept. 14, 2010) (quoting *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 966 (9th Cir. 2003)). "Forest [P]lans *guide* management strategies in the National Forests[,]" and the Forest Service acted within its discretion. *Coal. for Sustainable Res., Inc. v. U.S. Forest Serv.*, 259 F.3d 1244, 1248 n. 5 (10th Cir. 2001) (emphasis added). Not only are "goals" and "objectives" aspirational by definition (whether in ordinary usage or as defined in the BTNF Plan), but courts grant agencies broad discretion in interpreting their own regulations.

WWP forgets that "[a]n agency's actions need not be perfect; [courts] may only set aside decisions that have no basis in fact, and not those with which we disagree." *Biodiversity Conservation All. v. Jiron*, 762 F.3d 1036, 1074 (10th Cir. 2014) (quoting *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1099 (9th Cir. 2003)).

D. Project forage levels for Idaho fescue, sensitive amphibians, and migratory birds accomplish the "suitable and adequate" objective.

WWP argues that the forage levels chosen for the Idaho fescue, sensitive amphibians, and migratory birds "do *not* retain suitable and adequate amount of cover for wildlife." WWP Br. at 25 (emphasis in original). As explained below, the Forest Service selected Project level requirements that comply with the BTNF Plan for each of these species or groups.

1. The USFS properly considered whether 50% utilization of Idaho fescue retains suitable and adequate amounts of forage and cover.

One of the "[k]ey forage species for this and all allotments in this project area . . . [is the] Idaho fescue[.]" NFMA-FS-SAR-62858. In order to maintain "suitable and adequate amounts of forage and cover[,]" the ROD requires that "[t]he maximum forage utilization on *key forage species* will be 50 percent in upland, riparian, and wetland areas and a 4-inch stubble height minimum will be retained along the green line of streams." NFMA-FS-SAR-126; NFMA-FS-SAR-62858 (emphasis added). This level meets the Forage Utilization Standard percentages for rotation grazing even if the land was in unsatisfactory condition. *See* NFMA-FS-SAR-134.

Unable to show that the Project authorized grazing above the quantitative limits identified in the BTNF Plan, and relying on their theory that an objective is now a standard, WWP claims that the Forest Service "never considered the likelihood of inadequate cover for wildlife across the project area as a result of 50% utilization of Idaho fescue shorter than six inches." WWP Br. at 33. The Ranchers rely upon the Federal and State defendants for the detailed biological explanations of why WWP is wrong, but as explained briefly below, WWP is also wrong for common-sense reasons.

First, WWP misses the forest for the trees. A superficial review of the Project FEIS incorporated into and underlying the ROD demonstrates that the focus of the entire analysis—years of study by dozens of specialists culminating in hundreds of pages of summary data—was reconciling the need to provide forage, pursuant to BTNF Plan Goal 1.1 and Objective 1.1(h), with the need to avoid *all* the possible "unacceptable" effects of livestock grazing, pursuant to Goal 4.7, which includes the Objective 4.7(d) requirement for retaining adequate forage and cover for wildlife. That is the entire purpose of the Project:

> The purpose of the project is to continue to authorize livestock grazing in a manner that will maintain or improve resource conditions. The Bridger-Teton Land and Resource Management Plan (Forest Plan, U.S. Forest Service 1990) provides direction to support community prosperity in part through livestock grazing (Goal 1.1 and Objective 1.1(h), U.S. Forest Service 1990, p. 112-113) in a manner that avoids unacceptable effects from livestock use on range, soils, water, wildlife, and recreation values or experiences (Goal 4.7, U.S. Forest Service 1990, p. 120).

NFMA-FS-SAR-59111 (2017 FEIS); *see also* NFMA-FS-SAR-62816 (2019 ROD). This purpose, and the evaluation of every considered alternative against these BTNF Plan Goals, is infused into the Project FEIS. *See* NFMA-FS-SAR-59137–38 and NFMA-FS-SAR-59318–19 (table comparing alternatives against Goal 4.7); NFMA-FS-SAR-59150–51 (discussing Goal 4.7 as a Need for Action); NFMA-FS-SAR-59154 (discussing Goal 4.7 as the basis for evaluating current and desired conditions in the Project area); NFMA-FS-SAR-59167 (specifically considering Objective 4.7(d) in the context of elk); NFMA-FS-SAR-59173 (concluding Project implements direction of Goals 1.1 and 4.7); NFMA-FS-SAR-59599 (table summarizing consistency of Project with BTNF Plan, focusing on Goals 1.1 and 4.7, including Objectives 4.7(a)–(d)); NFMA-FS-SAR-59766, NFMA-FS-SAR-59767 (responses to concerns discussing Goal 4.7). Thus, it is simply farcical to say that the Project failed to consider Goal 4.7 and Objective 4.7(d).

Second, the Project protects forage and cover in several ways other than the direct utilization standard for fescue. For example, the ROD (and the AOIs) abides by the BTNF Plan in part by assuring that "[l]ivestock will not be allowed to enter the allotment prior to range readiness . . . [and] [r]ange readiness takes into account whether key plant species have had *sufficient* growth and development to *adequately* provide for their vigor…." NFMA-FS-SAR-62832 (emphasis added). The Project FEIS and ROD also consider and establish objectives for general ground cover, not limited to fescue. NFMA-FS-SAR-62820, NFMA-FS-SAR-62833. The Project provides additional cover in specific areas by establishing a minimum 4 or 6-inch stubble height limitation. NFMA-FS-SAR-62823–27. Finally, the ROD provides that forage utilization can be reduced in increments of 10% in subsequent years if satisfactory upland and riparian conditions are not met or maintained. NFMA-FS-SAR-62820–21. WWP fails to explain why these additional features of the Project documents should not be considered in evaluating, or fail to contribute to, suitable and adequate cover for wildlife.

And while WWP states a specific concern that perennial grass height of 4 inches is required for sage-grouse in certain times and areas, WWP does not address how its arguments are impacted by the

ROD provision for sage-grouse monitoring and considering sage-grouse before shifting any grazing season. NFMA-SAR-FS-62833, NFMA-FS-SAR-63835. WWP also does not acknowledge that the BTNF Plan was amended specifically for sage-grouse, NFMA-SAR-FS-62840, or discuss how that BTNF Plan amendment impacts the accomplishment of Objective 4.7(d). Thus, WWP's argument against the alleged inadequate Idaho fescue average height fails.

2. The Project provides suitable and adequate amounts of cover for sensitive amphibians.

WWP argues that the 50% forage utilization level does not sustain enough herbaceous vegetation to provide cover for sensitive amphibians. WWP Br. at 27. In the ROD, the Forest Service stated, "maximum forage utilization on key forage species in riparian and meadow areas [will be reduced] from 65% to 50%." NFMA-FS-SAR-62841. The forage reduction to 50% is helpful in providing adequate forage for amphibians not only because 15% less forage can be grazed, but because it's an *even more conservative number* than what is allowed in riparian rangeland — even on unsatisfactory rangeland. *See* NFMA-FS-SAR-134 (Forage Utilization Standard allowable percentages).

Further, WWP's myopic focus on a utilization percentage is no substitute for a robust analysis of cover that will remain available to amphibians. WWP cites an objective of 70% herbaceous retention for amphibians and a study equating 50% key species utilization with 54% herbaceous retention and leaps to the conclusion that herbaceous retention is inadequate. WWP Br. at 26–28. WWP's criticism, however, completely fails to acknowledge that amphibians prefer riparian areas, hence why riparian conditions are the *first* indicator of desired conditions for amphibians, NFMA-FS-SAR-95111–12, and that the Project provides additional protections of minimum stubble height in each riparian green line. NFMA-FS-SAR-62823–27.

In addition to a reduction of forage utilization, the "selected livestock grazing strategy includes . . . [twelve] actions intended to improve riparian area conditions[.]" NFMA-FS-SAR-62841–42. The Project FEIS had identified riparian function as the first resource objective in determining desired

conditions for amphibians, placing it ahead of herbaceous retention. NFMA-FS-SAR-59111–12. Some of the riparian improvement actions in addition to minimum stubble height include authorizing "approximately 10.5 miles of fence construction[,]" "[i]mplement[ing] all range improvements associated with riparian or wetland areas outside of the amphibian breeding season . . . to minimize disturbance to [the] species[,]" and "[i]mplement[ing] structural improvements that benefit riparian areas" among others. NFMA-FS-SAR-62841–42. Accordingly, "[t]his strategy positively affects riparian function through the design features and a mix of effects associated with range improvements and permittee travel." NFMA-FS-SAR-62841. WWP does not establish that these additional protections cumulatively do not result in adequate cover for amphibians or acknowledge that average total herbaceous retention in the Upper Green Allotment was already at 62% under the less protective prior management approaches. NFMA-FS-SAR-5814.

The Forest Service's decision to choose 50% utilization meets the prescribed Forage Utilization Standard in the BTNF Plan, is afforded discretion, and is only one small facet of the Project requirements that provide cover for amphibians.

3. The Project provides suitable and adequate amounts of cover for migratory birds.

WWP complains that "[t]he FEIS and ROD do not address alternatives' compliance with the Forage Utilization Standard and Objective 4.7(d) with regard to migratory birds[.]" WWP Br. at 30. A supplemental wildlife specialist report was produced in 2016 on migratory birds. NFMA-FS-SAR-5948 (beginning of migratory bird report). The 2016 migratory bird report analyzed Alternative 3, which was subsequently chosen in the 2017 FEIS. NFMA-FS-SAR-6092–99 (discussing Alternative 3); NFMA-FS-SAR-59110 (2017 UGRA FEIS stating "[t]he preferred alternative is Alternative 3"). WWP pointed to certain parts of the migratory bird report that claim "Alternative 3 was not designed or adjusted to meet Objective 4.7(d)," but the end of the analysis of Alternative 3 says quite the opposite. WWP Br. at 29 (quotation omitted) (citing NFMA-FS-SAR-6098). The migratory bird report reads:

> Although there is no indication that the maximum utilization limit of 50% of key forage species (55-70% herbaceous retention) in upland rangelands was designed to meet Objective 4.7(d) with respect to migratory birds, actual use of ≤35% of key forage species (≥70% herbaceous retention) in these upland rangelands would retain an *adequate amount of suitable forage and coverage for migratory birds*, and this utilization level likely would continue under this alternative, as explained in the analysis.

NFMA-FS-SAR-6099 (emphasis added).

In response to a comment on the EIS regarding compliance with the Migratory Bird Treaty Act, the Forest Service responded:

> As with most NEPA projects there are a range of alternatives, which usually vary in degree of impacts to migratory birds – some alternatives are better and some worse depending on the species. Although Alternative 3 may not provide as many benefits to migratory birds as Alternative 4, it does *move the area towards better habitat conditions*. This would ultimately benefit migratory birds while also meeting other multiple use missions such as livestock grazing compared to current management.

NFMA-FS-SAR-59821–22 (emphasis added).

Even when an agency explains its decision with 'less than ideal clarity[,]' a reviewing court will not upset the decision on that account 'if the agency's path may reasonably be discerned.'" *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004) (quoting *Bowman Transp, Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)); *Citizens' Comm. To Save Our Canyons v. Kreuger*, 513 F.3d 1169, 1176 (10th Cir. 2008) ("'A presumption of validity attaches to the agency action and the burden of proof rests with the appellants who challenge such action.'" (quoting *Colo. Health Care Ass'n v. Colo. Dep't of Soc. Servs.*, 842 F.2d 1158, 1164 (10th Cir. 1988))). The Forest Service's decision to choose 50% forage for migratory birds not only meets the prescribed Forage Utilization Standard in the BTNF Plan and is afforded agency discretion in the absence of a prescribed standard. NFMA-FS-SAR-134 (percentages prescribed in the BTNF Plan for the Forage Utilization Standard).

The Forest Service complied with NFMA when it created a BTNF Plan and subsequently allowed grazing on the Project. Grazing on the Project not only meets the multiple use requirements of NFMA, but strictly complies with Forage Utilization Standards set in the BTNF Plan. Absent numerical standards,

the Forest Service has discretion and is owed deference in interpreting the unquantified goals and objectives under the BTNF Plan.

CONCLUSION

Both FWS and USFS complied with their duties under the law. The 2019 BiOp and USFS's reliance on it are neither arbitrary nor capricious and the Project is consistent with the BTNF Plan. Petitioners fail to carry their heavy burden, and Rancher Intervenor-Respondents respectfully request that this court enter judgment for Respondents and against Petitioners.

Dated: January 26, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2022, I caused a true and correct copy of the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF system which sent notification of such filing to all counsel of record in this matter.

/s/ Zhonette M. Brown