Consolidated Appeal Nos. 22-8031 and 22-8043

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WESTERN WATERSHEDS PROJECT, ALLIANCE FOR THE WILD ROCKIES, and YELLOWSTONE TO UINTAS CONNECTION,
Petitioners/Appellants,

and

CENTER FOR BIOLOGICAL DIVERSITY and SIERRA CLUB
Petitioners/Appellants,

v.

DEBRA A. HAALAND, et al.,
Federal Respondents/Appellees

and

STATE OF WYOMING and UPPER GREEN RIVER CATTLE ASSOCIATION, et al.,
Intervenor Respondents/Appellees

On Appeal from the United States District Court for the District of Wyoming
Civil Action Nos. 0:20-cv-231-NDF and 0:20-cv-234-NDF
(Hon. Nancy D. Freudenthal)

ANSWERING BRIEF FOR INTERVENOR RESPONDENTS/APPELLEES GREEN RIVER CATTLE ASSOCIATION; SOMMERS RANCH, LLC; PRICE; CATTLE RANCH; MURDOCK LAND AND LIVESTOCK CO., AND WYOMING STOCK GROWERS ASSOCIATION

Oral argument is requested

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Intervenor Respondents/Appellees Upper Green River Cattle Association, Sommers Ranch, LLC, Price Cattle Ranch, Murdoch Land and Livestock Co., and Wyoming Stock Growers Association certify that none issues public shares or has any corporate parent or affiliate that issues public shares.

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PRIOR OR RELATED APPEALS

There are no prior or related appeals in this matter.

GLOSSARY

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 ("GYE") have made a profound recovery. That recovery has occurred alongside century-old grazing activity in the Upper Green River Area Rangeland Project ("Project"). Nevertheless, Appellants seek to end grazing on Bridger-Teton National Forest lands, arguing that this longstanding use of land outside of the Grizzly Recovery Zone jeopardizes the entire existence of the species that has recovered so robustly. This substantive allegation is contradicted by history and data. Moreover, none of Appellants CBD's and WWP's (together, the "Environmentalists'") procedural objections to the FWS's 2019 Biological Opinion ("BiOp") and USFS's approval of the Project carry water.

Separately, WWP argues again on appeal that the Forest Service failed to comply with the National Forest Management Act ("NFMA"). In particular, WWP claims that the Forest Service's allowance of grazing did not provide for suitable and adequate forage, at the expense of sensitive amphibians and migratory birds. However, the Forest Service properly considered multiple uses on the Project, 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 undefined terms in the BTNF Plan.

The district court properly upheld the agencies' decisions, which were reasonable, based on the scientific evidence, and demonstrate that the agencies considered all relevant factors. This Court should affirm.[1]

[1] In the interests of avoiding doubt and minimizing duplication, Rancher Respondent-Intervenor Appellees concur in and incorporate by reference all factual claims and arguments included in Federal Appellees' Answering Brief.

STATEMENT OF JURISDICTION

Rancher Respondent-Intervenor Appellees (collectively "Ranchers") concur in and incorporate by reference the statement of jurisdiction contained in Federal Appellees' brief. *See* Fed. Br. 2.

STATEMENT OF THE ISSUES

Rancher Respondent-Intervenor Appellees concur in and incorporate by reference the statement of the issues contained in Federal Appellees' brief. *See* Fed. Br. 2-3.

STATEMENT OF THE CASE

I. Statutory and regulatory 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.

A. 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 an 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 providing and explaining its determination (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).

B. 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 forest lands 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). This Court has repeatedly described a forest plan as "a broad, programmatic document." *See McKeen v. U.S. Forest Serv.*, 615 F.3d 1244, 1247 (10th Cir. 2010), *quoting Colo. Envt'l Coalition v. Dombeck*, 185 F.3d 1162, 1167–68 (10th Cir. 1999).

NFMA requires site-specific projects (like plans, permits, or contracts) to "be consistent with" the applicable forest plan. *See* 16 U.S.C. § 1604(i). The NFMA arguments raised by WWP in this appeal turn on several factors, including how to determine whether a project is "consistent with" a plan that has multiple competing economic and biological goals and the level of deference owed to the Forest Service

when making such determinations and reconciliations. *See* WWP Opening Br. 25-35; Fed. Br. 13, 45–53.

C. 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).

D. Factual Background

Central to this case is Ranchers' use of the Upper Green River Cattle Allotment located within the Upper Green River Area Rangeland Project. 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. R-Supp-App-35. 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. R-Supp-App-33. 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.* Grazing land is located further out on the surrounding mesa, desert, foothill, and mountain pastures based on a seasonal feeding pattern. *Id.*

In November 2013, the Green River Drift Trail was listed in the National Register of Historic Places as a Traditional Cultural Property ("TCP"). *Id.* 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 such as ranching. *Id.*

"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." 5-App-44. Indeed, entire communities depend on Forest land grazing. *See, e.g.*, F-Supp-App-16 ("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."); 5-App-077 ("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.").

The Forest Service developed the livestock grazing allotment system in the Project area, and some of the allotment boundaries were fenced, over a century ago. 11-App-126; R-Supp-App-46. Intervenor-Appellee Upper Green River Cattle Association was formed in and has operated continuously since 1916, with grazing remaining a constant but diminishing environmental presence. 2-App-275.

In return for the opportunity to put Forest grazing areas to socially beneficial use, Ranchers work "very cooperative[ly] . . . with the Forest Service to improve range conditions on their allotments." R-Supp-App-48. 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 Allotment permittees are also involved in a cooperative monitoring program with the Forest Service since 1996.

3-App-116.

Even so, 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 by then authorized only approximately 180,000 AUMs. 5-App-064; R-Supp-App-42. In thirty years, grazing has diminished by nearly 30%.

As explained in greater detail below, grazing, particularly at the reduced levels and in the supervised manner now currently approved, does not threaten the grizzly or other wildlife populations and is consistent with the Forest Plan.

E. Proceedings Below

Ranchers concur in and incorporate by reference the recounting of proceedings below contained in Federal Appellees' brief. *See* Fed. Br. 14-17.

SUMMARY OF ARGUMENT

The district court correctly concluded that the United States Fish and Wildlife Service ("FWS") and the United States Forest Service ("USFS") acted lawfully when FWS adopted the 2019 Biological Opinion ("BiOp") and USFS relied on that opinion and issued its Record of Decision ("ROD") authorizing continued livestock grazing in the Upper Green River area of Bridger-Teton National Forest ("BTNF") in Wyoming. The agencies fully satisfied the requirements of the Endangered Species Act ("ESA"), the National Forest Management Act ("NMFA"), and the Administrative Procedure Act ("APA"), and the district court's decision should be affirmed.

FWS complied with the ESA when it adopted the 2019 BiOp. Contrary to Environmentalists' claims, the absence of a sex-specific female take limit in the BiOp is lawful, because the agency reasonably concluded based on the best available evidence that a non-sex-specific take limit was sufficient to ensure that the project would not threaten the survival of GYE grizzlies. The BiOp does address grizzly mortality (including female mortality) both within and outside the Project area, and reasonably concludes that the removal of a limited number of problem bears from the Project area does not threaten the species. Moreover, FWS properly considered and utilized reasonable conservation efforts in the BiOp, and Environmentalists' contrary position would perversely amount to a ban on the inclusion of useful

conservation measures in future biological opinions unless those measures were *independently* sufficient to support such an opinion's conclusion.

Even if the 2019 BiOp had been flawed, USFS's reliance on the opinion was reasonable and therefore lawful. USFS was not required to duplicate effort by undertaking its own independent analysis of the issues addressed in the BiOp; such a rule would seriously undermine the expertise of consulting agencies like FWS. Environmentalists here take for granted that reliance on an unreasonable BiOp is itself arbitrary and capricious, but that position is contrary to law.

USFS's decision approving the Project also complied with NFMA and with the BTNF Plan. *First*, although WWP argues that the plan's Forest Utilization Standard ("FUS") incorporated all aspirational, unenforceable "Objectives" in the BTNF Plan and converted them into binding and enforceable "Standards," and that therefore the ROD fails to comply with BTNF Plan Objective 4.7(d) (concerning suitable and adequate amounts of cover for wildlife and fish), WWP's proposed reading of the Plan is unreasonable. Moreover, WWP's reading would mean that the FUS transmogrified *all* plan objectives into binding standards, including many objectives that conflict with Objective 4.7(d); WWP offers no basis for concluding that its preferred Objective 4.7(d) trumps the other 47 plan objectives – including the objective of providing grazing opportunities for 260,000 Animal Unit Months ("AMUs") annually. *Second*, USFS's decision *does* provide for "reasonable and

adequate" forage and cover and would thus satisfy Objective 4.7(d) even if it were transformed into an enforceable standard. *Third*, even if USFS's decision were not correct, USFS is entitled to deference in its judgments balancing conflicting forest uses, and the Court may not lawfully substitute its own judgment for the agency's.

STANDARD OF REVIEW

This Court reviews the district court's decision upholding the challenged agency decisions *de novo*. *Wildearth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178, 1182 (10th Cir. 2013).

The standard of review applied by this Court is the same extremely deferential standard applied by the court below under the Administrative Procedure Act. 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).

ARGUMENT

I. FWS complied with the ESA.

FWS complied with the ESA when it adopted the 2019 BiOp. Environmentalists contend that the absence of a sex-specific female take limit in the BiOp is arbitrary and capricious. But FWS reasonably concluded based on the best available evidence that a non-sex-specific take limit was sufficient to ensure that the project would not threaten the survival of GYE grizzlies. The BiOp does address grizzly mortality (including female mortality) both within and outside the Project area, and reasonably concludes that the removal of a limited number of problem bears from the Project area does not threaten the species.

Environmentalists also argue that FWS unlawfully relied on various conservation measures in the 2019 BiOp to support its no-jeopardy determination. But FWS properly considered and utilized reasonable conservation efforts in the BiOp, and Environmentalists' contrary position would perversely amount to a ban on the inclusion of useful conservation measures in future biological opinions, unless those measures were *independently* sufficient to support such an opinion's conclusion.

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

Environmentalists suggest that the failure to include a female-specific take limit in the 2019 BiOp was an unexplained change from past practice. CBD Opening

Br. 21-22; WWP Opening Br. 38. But the 2019 BiOp is the *third* time FWS had declined to include a female take limit for conflict bears (violent bears that attack and kill or injure humans or livestock) in the Project area. *See* 2-App-184 (2010); 2-App-184 (2014).

Even if such a practice had been established, the 2019 BiOp would not materially deviate from it, because it *does* discuss and rely on the specific mortality limits for female grizzlies. 2-App-163-164, 2-App-175-176, 2-App-189-190, 2-App-192. 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." 2-App-190-91. 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. 2-App-245-46 (2017 Supplement to Recovery Plan). *See also Ctr. for Biological Diversity v. U.S. Fish and Wildlife Svc.*, 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. 23.

Environmentalists' position that the absence of a sex-specific take limit threatens the species' existence is directly contrary to FWS's reasoned conclusion that removal of a limited number of problem bears has not had detrimental impacts on the GYE population, and thus will not jeopardize the survival of the species. 2-App-182. Even if Environmentalists 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). Neither 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).

Finally, Environmentalists' suggestion that FWS failed altogether to consider female mortality as an aspect of the problem (CBD Opening Br. 21-25; WWP Opening Br. 40) is belied by the 2019 BiOp's specific discussion of female mortality. 2-App-033-34, 2-App-192. And the reason female mortality is relevant is because it is relevant to maintaining the species, which USFS reasonably concluded would be accomplished without a sex-specific limit. 2-App-169 ("[T]otal mortality limits will preclude population-level impacts.").

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

WWP invokes the "sink habitat" designation for much of the Project area, implying it is a serious signal of danger to the species' survival. WWP Opening Br. 11-12, 17, 41-43. 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. 2-App-240. Sinks are generally "associated with human activity and development," 7-App-224, 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. 2-App-240. Good management involves encouraging bears to choose source habitats over sink habitats, 2-App-240, in order to "ensure that mortality . . . does not result in a population decline in source habitat," 2-App-241. But as bears become over-concentrated in source habitats, some will inevitably drift to sink habitats. 2-App-240 ("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 Environmentalists acknowledge, not all the grazing areas are sink habitats. WWP Opening Br. 11. Nor are all sink habitats grazing areas. USA-Supp-App-60, Fig. 5. And 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.

Thus, removal of bears from the Project area is *not* why the Project area is largely sink habitat; in fact, conflict bears have been specifically *excluded* from source-sink population analysis, because they form a biased sample. *See, e.g.,* 2-App-051 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. 2-App-177 ("Grizzly bears continue to expand outward in the GYE, including and beyond the action area."), 2-App-189 ("We believe this trend [increasing conflicts] was due to a growing bear population[.]"), 2-App-190 (conflicts increasing "as the number of bears using the core habitats have reached capacity").

C. The 2019 BiOp properly considered and utilized reasonable conservation measures.

Environmentalists 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 allegedly vague, not certain to occur, unenforceable, and ineffective. CBD Opening Br. 25-30; WWP Opening Br. 47-54. Environmentalists' arguments about vagueness, uncertainty, and unenforceability fail for two reasons: first, because the relevant measures are not vague, uncertain, and unenforceable; second, because Environmentalists misunderstand the requirement that certain measures meet those

standards under limited circumstances not present here. Environmentalists' arguments regarding ineffectiveness are unsupported by the record and merely seek impermissibly to substitute their own judgment for that of FWS.

Generally, Environmentalists misinterpret standards a conservation measure must meet to be *sufficient* to support a no-jeopardy determination as a ban on inclusion of 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. WWP (at 47-54) relies primarily on *Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139 (D. Ariz. 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* 2-App-192 (noting FWS "*review[ed]* . . . the Forest's commitment to implement their Conservation Measures" (emphasis added)) *with* 2-App-192 ("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 Environmentalists also rely, CBD Opening Br. 19, 26, 28; WWP Opening Br. 49, 51-52, 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. 2-App-192. 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. Environmentalists 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 Environmentalists' objections to the Conservation Measures are dependent on mischaracterizing those measures.

Environmentalists argue that Measure 2, which requires riders to watch livestock closely for sick, injured, or stray animals, is "not reasonably certain to occur," because it "relies on permittees[.]" CBD Opening Br. 27. But Measure 2 literally uses the word "required." 2-App-153. CBD complains that Measure 2 fails to define "closely" by specifying a number of riders to be on the range at any given time and "how often they should be checking on the livestock." CBD Opening Br. 28. But any discretion bestowed by Measure 2 to determine what constitutes "watch[ing] all livestock closely" is bestowed on *USFS*, not its permittees. 2-App-

153 ("Riders are required to watch all livestock closely…").

CBD argues that Measure 3 is not "reasonably specific" because it requires monitoring on a regular basis and does not define those terms. CBD Opening Br. 29. But there is nothing unreasonable about requiring regular monitoring without creating an inflexible date-specific schedule. 2-App-153.

CBD argues that Measures 4 and 5 are ineffective because they are illusionary or aspirational, CBD Opening Br. 25–26. But as Federal Respondents explain, Fed. Br. 38-39, Measures 4 and 5 *do in fact* require removal or destruction of carcasses, with exceptions only for safety reasons. 2-App-153 ("all carcasses . . . *will be removed* if possible" (emphasis added)).

D. Even if the 2019 BiOp had been flawed, USFS's reliance on it was reasonable and therefore lawful.

"[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). Environmentalists point to no such information here, and do not claim that the BiOp was facially flawed. Rather, they take for granted that it's arbitrary and capricious to rely on a BiOp later determined to be arbitrary and capricious. CBD Opening Br. 30; WWP Opening Br. 55-56. That is not the law. *City of Tacoma*, 460 F.3d at 75–76. Environmentalists bear the burden of showing that this (false) claim is true, and they do not attempt to carry it.

E. USFS complied with NFMA.

WWP seeks to have this Court treat an aspirational objective in the BTNF Plan as enforceable standard, and to hold that this specific BTNF Plan "objective" trumps all others. But the Forest Service must balance conflicting Plan objectives, and USFS is owed deference in choosing how to weight and accomplish them. WWP's arguments 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, *do* 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 the district court's decision should be affirmed.

1. The project documents are consistent with the 1990 BTNF plan regarding forage utilization.

The Project documents meet or exceed the requirements of the Forage Utilization Standard in the BTNF Plan. NFMA requires the Forest Service to devise a management plan for each forest unit and then requires that any future 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). The Upper Green River Area Rangeland Project must be consistent with the BTNF Plan; review of the relevant documents demonstrates that it is so.

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

5-App-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* 4-App-169; 4-App-155; 11-App-125 (the Project FEIS elected Alternative 3 as the preferred option); 11-App-130 (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[]"); 2-App-275 (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." 11-App-175. The Project FEIS identifies seven "focus areas" that "do not currently meet desired conditions..." 11-App-129.

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.[2] 4-App-148-52 (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:

[2] 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. 4-App-148-152. 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." 4-App-149.

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.

14-App-122. The site-specific limitations are also restated in the respective AOIs:

> 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.

15-App-090 (AOI for Upper Green River Allotment).

In short, the district court correctly concluded that the ROD, the permits, and the AOIs are consistent with the quantified Forage Utilization Standard in the BTNF Plan, and WWP fails to show otherwise.

2. The Forage Utilization Standard in the 1990 BTNF Plan does *not* transmogrify all plan objectives (or even just the one objective WWP cares about) into binding standards.

WWP's argument rests on the erroneous (and undefended) position that the Forage Utilization Standard incorporates all BTNF Plan objectives, and thus converts them from objectives to standards. *See* WWP Opening Br. 27-28. This argument misconstrues one sentence in the BTNF Plan and ignores the rest.

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

5-App-134. WWP claims that this made the "Forest Plan objectives" part of the Forage Utilization Standard. WWP Opening Br. 5-7, 27. 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 Opening Br. 5-7, 27-28. WWP notes that Objective 4.7(d), requires suitable and adequate amounts of forage and cover for wildlife and fish. *Id.* at 7. Taking it as a given that the Project is therefore "required" to meet this BTNF Plan objective, WWP proceeds to fault USFS for failing to "adequately explain how the UGRA Project complied with the Forage Utilization Standard" (by which, again, WWP means Objective 4.7(d)). WPP Opening Br. 28. WWP says that because the selected alternative "fails to require the retention of suitable and adequate amounts of cover," it does not comply with the Objective, which means it does not comply with the Standard, which means that it violates NFMA. WWP Opening Br. 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." WWP Opening Br. 6, citing 5-App-134. Nowhere does WWP address the language of 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

5-App-010-11. WWP's 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 is baseless.

Third, there is also no basis for WWP to imagine 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. 5-App-118-25; 5-App-119 (Objective 1.1(h)). The BTNF Plan also includes dozens of goals and standards. 5-App-118-27 (listing goals and objectives); 5-App-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 has WWP explained any basis for this 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. 5-App-119. *See also* 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)); R-Supp-App-42 ("[T]he Forest currently authorizes approximately 180,000 AUMs.").

WWP complains that the District Court only noted *one* conflicting objective before dismissing its theory. WPP Opening Br. 27-29. The District Court's analysis, 1-App-148-49, was correct. The presence of even one objective conflicting with 4.7(d) is sufficient to demonstrate the absurdity of WWP's interpretation of the FUS; that there are (as WWP concedes at 27) many, many more such objectives renders WWP's theory perhaps more amusing, but not more coherent. The District Court, having established a fatal error, was under no obligation to explore every additional way in which the theory's failure might be established.

3. 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's preferred Objective, of course, is 4.7(d): "[r]equir[ing] that suitable and adequate amounts of forage and cover are retained for wildlife and fish[.]" 5-App-126. The BTNF Plan contains over 100 goals, objectives, and standards. 5-App-118–27 (listing goals and objectives); 5-App-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." 11-App-188 (emphasis added). The resulting needed balancing necessarily depends on exercise of discretion by the Forest Service, and this court should not accept WWP's invitation to refuse deference to that exercise.

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 Alliance 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)).

4. 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 in fact do not retain suitable and adequate amount of cover for wildlife. WWP Br. 32-37. As explained below, the Forest Service selected Project level requirements that do retain suitable and adequate cover for each group.

a. 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[.]" 4-App-183. 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." 5-App-126; 4-App-183 (emphasis added). This level meets the Forage Utilization Standard percentages for rotation grazing even if the land was in unsatisfactory condition. *See* 5-App-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 failed to adequately consider, for example, the height of ungrazed Idaho fescue. WWP Opening Br. 30-31. The Ranchers defer Federal Appellees' explanation, Fed. Br. 48-52, of why WWP is wrong biologically – they are, after all, the experts – but WWP is also wrong for other 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).

11-App-126 (2017 FEIS); *see also* 4-App-141 N (2019 ROD). This purpose, and the evaluation of every considered alternative against these BTNF Plan Goals, is infused into the Project FEIS. *See* 11-App-152-43 and 12-App-035-36 (table comparing alternatives against Goal 4.7); 11-App-165-66 (discussing Goal 4.7 as a Need for

Action); 11-App-169 (discussing Goal 4.7 as the basis for evaluating current and desired conditions in the Project area); 11-App-182 (specifically considering Objective 4.7(d) in the context of elk); 11-App-188 (concluding Project implements direction of Goals 1.1 and 4.7); 13-App-018 (table summarizing consistency of Project with BTNF Plan, focusing on Goals 1.1 and 4.7, including Objectives 4.7(a)–(d)); 13-App-185-86 (responses to concerns discussing Goal 4.7). USFS manifestly considered 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…." 4-App-157 (emphasis added). The Project FEIS and ROD also consider and establish objectives for general ground cover, not limited to fescue. 4-App-145, 158. The Project provides additional cover in specific areas by establishing a minimum 4 or 6-inch stubble height limitation. 4-App-148-52. 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. 4-App-145-46. 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.

i. 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 Opening Br. 35-37. 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%." 4-App-166. 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* 5-App-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 Opening Br. 34. WWP's criticism, however, disregards that amphibians prefer riparian areas, hence why riparian conditions are the *first* indicator of desired conditions for amphibians, and that the Project provides additional protections of minimum stubble height in each riparian green line. 4-App-148-52.

In addition to a reduction of forage utilization, the "selected livestock grazing strategy includes . . . [twelve] actions intended to improve riparian area conditions[.]" 4-App-166. The Project FEIS had identified riparian function as the first resource objective in determining desired conditions for amphibians, placing it ahead of herbaceous retention. 11-App-126-27. 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. 4-App-166-67. Accordingly, "[t]his strategy positively affects riparian function through the design features and a mix of effects associated with range improvements and permittee travel." 4-App-166. 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. 5-App-077.

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

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

WWP complains that the selected alternative fails to require retention of suitable and adequate amounts of cover for migratory birds. WWP Opening Br. 35-37. A supplemental wildlife specialist report was produced in 2016 on migratory birds. 9-App-001 (beginning of migratory bird report). The 2016 migratory bird report analyzed Alternative 3, which was subsequently chosen in the 2017 FEIS. 9-App-145-52 (discussing Alternative 3); 11-App-125 (2017 UGRA FEIS stating "[t]he preferred alternative is Alternative 3"). WWP points to certain parts of the migratory bird report that claim that 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 Opening Br. 36 (quotation omitted) (citing 9-App-151). 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.

9-App-152 (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.

(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 owed deference in the absence of a prescribed standard. 5-App-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.

5. Remedy

The Court should uphold the agencies' actions. But as the Federal Government correctly argues, if the Court rules in Environmentalists' favor, it should not vacate the FWS BiOp and USFS decision, but instead remand to the agencies for further proceedings. Fed. Br. 52-53. In particular, vacating the agencies' action here would lead to the sort of egregiously "disruptive consequences" that counsel against vacatur of unlawful agency decisions. *Allied-Signal v. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). *See also WildEarth Guardians v. U.S. Bureau Land Mgmt.*, 870 F.3d 1222, 1239–40 (10th Cir. 2010) (deciding against vacatur based in part to potential disruption of ongoing mining operations).

The route and use of the Green River Drift Trail, to which grazing on these allotments are essential, currently continues essentially as it has every year since at least the 1890s. R-Supp-App-34-35. In late spring, Ranchers graze their cattle on lower ground. R-Supp-App-34. Cowboys start removing cattle from spring pastures and trailing them up to 68 miles north to the allotments at issue here beginning in the middle of June. *Id.* Summer grazing begins around June 16 and lasts through October 15 of every year. *Id.* Moving the cattle to higher ground allows lower

pastures to produce harvestable hay. The haying season on private lands corresponds with the summer grazing season on public lands. *Id.*

In the winter, cattle graze on the lower pastures and meadows at their respective home ranches. R-Supp-App-35. 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.* The grazing allotments accessed via the Drift are essential to the ranchers' entire operations because of the feed they provide to growing cattle, and the time they give private land to grow the next hay crop, which will feed the cattle herds during the next winter. *Id*.

Vacatur would threaten disruption of this tried-and-true, century-old cycle, on which Ranchers and their communities depend for their livelihoods. *See* 4-App-167. If the Court does not affirm, it should remand *without* vacatur so that the agencies may remedy any deficiencies without threatening irremediable harm to Ranchers. *See WildEarth Guardians v. U.S. Bureau Land Mgmt.*, 870 F.3d 1222, 1239–40 (10th Cir. 2010) (remanding without vacatur based in part to potential disruption of ongoing mining operations); *Utah Physicians for a Healthy Env. v. U.S. Bureau of Land Mgt.*, 528 F. Supp. 3d 1222, 1236–37 (D. Utah 2021), *appeal dismissed*, 21-4069, 2021 WL 5570560 (10th Cir. June 21, 2021) (remanding without vacatur where "vacatur would disrupt the activities that have commenced since the lease

approval" at issue); *Citizens for a Healthy Community v. U.S. Bureau of Land Mgt.*, 17-CV-02519-LTB-GPG, 2019 WL 13214042, at *2 (D. Colo. Dec. 10, 2019) (remanding without vacatur based on possibility of disruption and "serious possibility" agencies could substantiate their decisions on remand); *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 781 F.3d 1271, 1289–91 (11th Cir. 2015) (remanding to district court without directing vacatur where vacatur might pose risk of "devastating consequences to the mining industry" from disruption of operations).

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's decision upholding the challenged agency actions.

Respectfully submitted, December 2, 2022,

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STATEMENT REGARDING ORAL ARGUMENT

Intervenor Respondent-Appellee Ranchers respectfully suggest that oral argument would materially assist the Court.

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. This document complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Rule 32(f), this document contains 8,545 words.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made, per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents; and

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Windows Defender Antivirus, and according to the program are free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2022, I electronically filed the foregoing using the court's CM/ECF system, which will send notification of such filing to counsel. Parties who are not registered with CM/ECF system were served via U.S. Mail.

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