Nos. 09-36100, 10-35043, 10-35052, 10-35053, and 10-35054

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREATER YELLOWSTONE COALITION,

Plaintiff-Appellee,

v.

CHRISTOPHER SERVHEEN, in his official capacity as U.S. Fish and Wildlife Service Grizzly Bear Coordinator, *et al.*,

Defendant-Appellants,

and

STATE OF WYOMING, *et al.*,

Intervenor Defendant-Appellants.

Appeal from the United States District Court for the District of Montana
Civ. No. 07-134-DWM

GREATER YELLOWSTONE COALITION'S ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, plaintiff-appellee Greater Yellowstone Coalition hereby certifies that it has no parent corporation and that no publicly held corporation holds 10 percent or more of its stock.

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STATEMENT OF JURISDICTION

(A) The district court had subject matter jurisdiction of these consolidated cases pursuant to 28 U.S.C. § 1331 (federal question), 16 U.S.C. § 1540(g) (Endangered Species Act citizen suits), and 5 U.S.C. § 702 (waiver of sovereign immunity), and had jurisdiction to issue relief pursuant to 28 U.S.C. §§ 2201 (declaratory judgment) and 2202 (further relief).

(B) This Court has jurisdiction of these appeals from the district court's entry of final judgment pursuant to 28 U.S.C. § 1291.

(C) The district court issued its judgment on September 21, 2009, Fed. ER 1:60, then granted, in part, federal defendants' Rule 59(e) motion to amend or alter judgment on November 17, 2009, Fed. ER 1:61-68.[1] Notices of appeal were filed by federal defendants on January 15, 2010, Fed. ER 1:69-71; Safari Club International on January 12, 2010, SC ER 2:79-81; State of Wyoming on December 15, 2009 and January 19, 2010, WY ER 2:56-71; State of Montana on January 15, 2010, MT ER 1:1-3; and National Wildlife Federation on January 15, 2010, GYC SER 32. All were filed within the time allowed by Fed. R. App. P. 4(a)(1)(B) and 4(a)(4)(A).

[1] Citations to appellants' excerpts of record ("ER") include both volume and page designations for those appeals with multi-volume excerpts. Citations to the Greater Yellowstone Coalition's supplemental excerpts of record ("GYC SER") include only page numbers.

STATEMENT OF THE ISSUES

I. Whether the U.S. Fish and Wildlife Service ("FWS") acted arbitrarily and in violation of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq., by declaring that the grizzly bear population in the Greater Yellowstone Ecosystem is not threatened by the dramatic decline of its most essential food source—the seeds of the whitebark pine tree.

II. Whether FWS acted arbitrarily and in violation of the Endangered Species Act by determining that unenforceable management plans and conservation agreements were sufficient to secure the Yellowstone grizzly bear population against well-documented threats to its survival following the removal of the legal protections afforded by the ESA.

Pertinent authorities are reproduced in an addendum to this brief and in the addendum provided by Federal Defendants.

STATEMENT OF THE CASE

This case presents questions of fundamental importance to both the continued survival of grizzly bears in Yellowstone National Park and surrounding lands and the continued viability of the Endangered Species Act.

On March 29, 2007, the U.S. Fish and Wildlife Service declared that the isolated population of grizzly bears remaining in the Greater Yellowstone ecosystem in Montana, Wyoming, and Idaho is no longer a "threatened species"

entitled to the ESA's protections despite the ongoing demise of the bears' most critical food source—whitebark pine seeds—and the failure of federal and state agencies to implement essential regulatory protections for the species. See 72 Fed. Reg. 14,866 (Mar. 29, 2007) ("delisting rule") (Fed. ER 4:671). Greater Yellowstone Coalition ("the Coalition") filed this lawsuit challenging the removal of the Yellowstone grizzly bear from the list of threatened species on November 13, 2007. Fed. ER 1:1. The district court subsequently granted intervention requests filed by the State of Montana, the State of Wyoming, Safari Club International, National Wildlife Federation, and others. Fed. ER 6:1176-78 (Dkt. Nos. 27, 28, 29, 36).

In its September 21, 2009 decision, the district court granted summary judgment to the Coalition on two of its four claims, holding that FWS had acted arbitrarily and unlawfully in determining that the Yellowstone grizzly population was no longer threatened despite the ongoing demise of whitebark pine and the inadequacy of existing regulatory mechanisms. Greater Yellowstone Coalition, Inc. v. Servheen, 672 F. Supp. 2d 1105, 1113-20 (D. Mont. 2009) (Fed. ER 1:14). The district court vacated FWS's delisting rule and enjoined the agency from removing the Yellowstone grizzly bear population from the list of threatened species. Id. at 1126-27.

On October 5, 2009, FWS filed a Federal Rule of Civil Procedure 59(e) motion to alter or amend the district court's judgment, seeking to reargue the merits of the case and undo the district court's remedy. See Fed. ER 1:62, 6:1186. On November 17, 2009, the district court declined FWS's invitation to rewrite its merits ruling, but clarified that its order did not preclude FWS from issuing a subsequent regulation delisting the Yellowstone grizzly bear population. Fed. ER 1:61-68. These appeals followed. See Fed. ER 6:1188-89 (Dkt. Nos. 136, 138, 140, 142, 143).

STATEMENT OF FACTS

I. THE GRIZZLY BEAR

The grizzly bear, Ursus arctos horribilis, once numbered more than 50,000 individuals in its North American range south of the Canadian border. See 72 Fed. Reg. at 14,866-68; Fed. ER 3:325-26 (Montana management plan EIS). Before settlement of the American West, grizzly bears roamed from the Great Plains to the Pacific coast, inhabiting all but the hottest and most arid desert lands. See 72 Fed. Reg. at 14,868. Grizzlies fed on bison carcasses in the Great Plains and beached whales on the Pacific coast. Id. at 14,912; Fed. ER 3:326. With European settlement, however, grizzlies were "shot, poisoned, and trapped wherever they were found," eliminating them from all but mountain redoubts far removed from human intolerance. 72 Fed. Reg. at 14,868.

In an historical blink of an eye, humans restricted the range of grizzly bears by nearly 99 percent, isolating the remaining bears in a few remnant islands of wild country. Id. By 1975, the grizzly bear population in the continental United States had plummeted to fewer than 1,000 individuals. Id.; GYC SER 213. Even in Yellowstone, our nation's first national park, an isolated grizzly bear population spiraled toward extinction. 72 Fed. Reg. at 14,868-69.

Despite its legendary ferocity, the grizzly's natural characteristics make it particularly vulnerable to human persecution—grizzlies are hard to grow and easy to kill. See id. at 14,866-69. Due to their late age at first reproduction, small litter sizes, and long time interval between litters, grizzlies have one of the slowest reproductive rates among terrestrial mammals. See id. at 14,867. Female grizzlies in the Yellowstone area generally do not reproduce until their sixth year and, on average, produce small litters of only two bears. Id. Even with an increasing population, "it may take a single female 10 years to replace herself." Id. Grizzly bear cubs stay with their mother for two to three years, learning how to survive in the wild before they disperse to establish their own home ranges. See id.

Grizzlies require extraordinarily large home ranges, with adult male home ranges averaging 337 square miles (874 square kilometers). Fed. ER 3:336 (Montana management plan EIS). After leaving their mother, young grizzly bears establish home ranges within or overlapping with their mother's home range,

making range recovery a long and difficult endeavor. 72 Fed. Reg. at 14,867. As grizzly bears roam widely within their home ranges, habitat degradation and improper storage of human foods in any portion of their home range puts them at risk. See id. at 14,934; Fed. ER 2:185-89 (Conservation Strategy).

Human-caused mortality—including hunter self-defense, poaching, and agency removal of bears involved in conflicts—remains the principal cause of grizzly bear deaths in the Greater Yellowstone region. See 72 Fed. Reg. at 14,920-22; Fed. ER 5:985 (Schwartz, et al. (2006c)) ("[H]umans are the single greatest cause of grizzly bear deaths in the [Greater Yellowstone Ecosystem]."). Bears may eat livestock and improperly stored human garbage, which can lead to habituation and human-caused mortality. 72 Fed. Reg. at 14,867-68.

II. GRIZZLY BEAR LISTING AND RECOVERY PLANNING

In 1973, spurred in part by the grizzly's plight, Congress enacted the Endangered Species Act as a means of extending mandatory protections to species threatened or endangered by the "destruction, modification, or curtailment of [their] habitat or range; … overutilization for commercial, recreational, scientific, or educational purposes; … disease or predation; … the inadequacy of existing regulatory mechanisms; or … other natural or manmade factors affecting [their] continued existence." 16 U.S.C. § 1533(a)(1); see also Tenn. Valley Auth. v. Hill, 437 U.S. 153, 183-84 (1978) (noting Congress's determination that "'the

continental population of grizzly bears … [wa]s surely threatened'" and "'[o]nce [the ESA] bill [wa]s enacted, the appropriate Secretary … w[ould] have to take action to see that this situation is not permitted to worsen, and that these bears are not driven to extinction'") (quoting 119 Cong. Rec. 42,913 (1973)) (emphasis omitted). Two years later, FWS listed grizzly bears in the lower-48 states as a threatened species. See 40 Fed. Reg. 31,734 (July 28, 1975).

While imperilment under any one of the ESA's listing criteria alone would have compelled recognition of the species' threatened status, FWS determined that grizzlies were imperiled in the continental United States under four of the five statutory listing factors. See id. First, FWS determined that the bears were threatened by habitat loss, 16 U.S.C. § 1533(a)(1)(A), because the once wide-ranging species was "confined to isolated regions in Montana, Idaho and Wyoming," 40 Fed. Reg. at 31,734. FWS singled out "[t]imbering practices" and road building that had made grizzlies more vulnerable to humans. Id. Second, FWS determined that lower-48 grizzlies were threatened by "overutilization," 16 U.S.C. § 1533(a)(1)(B), because of both illegal killings and legal killings associated with perceived threats to human safety and livestock, 40 Fed. Reg. at 31,734. Third, FWS determined that lower-48 grizzlies were threatened by "the inadequacy of existing regulatory mechanisms," 16 U.S.C. § 1533(a)(1)(D), due to the "lack of regulatory mechanisms to control take and protect habitat," 72 Fed.

Reg. at 14,922; see 40 Fed. Reg. at 31,734-36. Finally, FWS determined that lower-48 grizzlies were further threatened by "other natural or manmade factors," 16 U.S.C. § 1533(a)(1)(E), including recreational use of Yellowstone National Park, livestock grazing on public lands, and the fact that "[i]n two of the three areas where grizzly bears still occur"—including the Yellowstone region—"bears are isolated from other populations so that they cannot be reinforced, either genetically or by movement of individual bears," 40 Fed. Reg. at 31,734.

Upon its listing under the Endangered Species Act,

> the grizzly bear immediately benefited from a Federal regulatory framework that included prohibition of take … ; prohibition of habitat destruction or degradation if such activities harm individuals of the species; the requirement that Federal agencies ensure their actions will not likely jeopardize the continued existence of the species; and the requirement to develop and implement a recovery plan for the species.

72 Fed. Reg. at 14,922; see also, e.g., 16 U.S.C. § 1536(a)(2) (prohibiting federal agencies from "jeopardiz[ing] the continued existence of any … threatened species"); id. § 1533(d) (requiring regulations "deem[ed] necessary and advisable to provide for the conservation of [threatened] species").

The grizzly bear's political fortunes, however, did not change. In response to regional pressures, FWS abandoned an early, and highly contentious, proposal to designate critical habitat for lower-48 grizzlies under the ESA. See 41 Fed. Reg. 48,757 (Nov. 5, 1976) (proposed critical habitat designation). That proposal would have applied new legal protections to important habitat for Yellowstone grizzlies.

Id.; see also 16 U.S.C. § 1536(a)(2) (prohibiting "the destruction or adverse modification" of designated critical habitat by federal agencies). FWS has never again proposed an ESA critical habitat designation for threatened grizzlies.

In 1982—seven years after the species' listing—FWS adopted its first recovery plan for grizzlies. See 72 Fed. Reg. at 14,869. The plan identified a "recovery zone" in the Yellowstone region that was designed to delineate habitat for only 229 grizzlies—an area much smaller than that which FWS had previously proposed as critical habitat in the region, and which lacked the legal protections that an ESA critical-habitat designation would have afforded. See GYC SER 215-16 (1982 Grizzly Bear Recovery Plan); GYC SER 292-94; see also 72 Fed. Reg. at 14,869. The agency then developed a revised recovery plan in 1993 that failed to withstand judicial scrutiny because it lacked recovery criteria for grizzly habitat, despite the Service's prior regulation finding that grizzlies were imperiled by habitat loss. See Fund for Animals. v. Babbitt, 903 F. Supp. 96, 112-13 (D.D.C. 1995), amended by 967 F. Supp. 6 (D.D.C. 1997); 40 Fed. Reg. at 31,734. The plan was subsequently amended pursuant to a settlement agreement. See 72 Fed. Reg. at 14,870.

III. THE CHALLENGED DELISTING DECISION

As a result of this troubled history, many of the threats to grizzly bears identified by FWS in 1975 persist today in the Greater Yellowstone ecosystem.

While the region's grizzly population has likely increased somewhat to an estimated 400 to 600 bears, it has remained isolated from any other grizzly population for a century or more. See 72 Fed. Reg. at 14,869, 14,878. Much of the grizzly's remaining habitat in the Yellowstone region is still open to human development activities under federal land-use plans. See, e.g., GYC SER 38-40. Moreover, Idaho, Montana, and Wyoming have failed to enact laws imposing necessary limits on the killing of grizzlies by humans. See Section III, infra.

In addition to these long-recognized threats, new perils for Yellowstone grizzlies have emerged. Most significantly, the Yellowstone grizzly population is unique in North America for its overwhelming dependence upon one critical food source—the fatty seeds of the whitebark pine tree. See 72 Fed. Reg. at 14,878. However, the combination of a warming climate, an insect pest, and an exotic disease now promises to virtually eradicate whitebark pine from the vast majority of the Yellowstone region. See id. at 14,927-30. The bears' other important food sources—including Yellowstone cutthroat trout, elk, bison, and army cutworm moths—also face present or future threats. See id. at 14,927-33.

Unmoved by the population's predicament, FWS on November 17, 2005 proposed to designate Yellowstone's grizzlies as a distinct population segment ("DPS") under the ESA and remove them from the list of threatened species. 70

Fed. Reg. 69,854 (Nov. 17, 2005).[2] Two weeks before delisting, FWS published a final "Conservation Strategy," which was intended "to serve as the regulatory mechanism guiding [Yellowstone grizzly bear] management" after its ESA protections were lifted. 72 Fed. Reg. 11,376 (Mar. 13, 2007). In the Conservation Strategy, FWS renamed the 1982 Yellowstone grizzly bear "recovery zone" the Primary Conservation Area ("PCA"), and focused its conservation direction almost exclusively on this area. 72 Fed. Reg. at 14,873-74. This PCA encompassed only 61 percent of the habitat occupied by the Yellowstone grizzly population. See Fed. ER 5:941 (Schwartz, et al. (2006b)). Nevertheless, FWS relied on bears throughout the DPS—including bears both inside and outside the PCA—to claim satisfaction of population numbers required for delisting. See 72 Fed. Reg. at 14,871-72, 14,935. Even within the PCA, the Conservation Strategy is long on hopes and aspirations, but short on concrete steps and binding measures for conserving a recovered Yellowstone grizzly bear population. See Section III, infra. On March 29, 2007, the agency published a final decision stripping the Yellowstone grizzly bear population of its protections. Id. at 14,866.

[2] The ESA provides for listing decisions at the species, subspecies, or DPS level. See 16 U.S.C. § 1532(16) (defining "species").

SUMMARY OF THE ARGUMENT

This Court should affirm the decision below.

First, FWS acted arbitrarily and unlawfully in declaring that the Yellowstone grizzly bear population is no longer threatened despite the dramatic and ongoing demise of the population's most important food source, the seeds of the whitebark pine tree. See Section II, infra. In the past three decades, researchers have documented the dramatic effect that whitebark pine seed productivity has on the viability of the Yellowstone grizzly population. Despite this evidence, FWS delisted Yellowstone grizzlies based solely on speculation that, because grizzly bears are omnivores, they would simply adapt to the loss of whitebark pine—achieving a behavioral modification that the bears have never demonstrated in thirty years of scientific scrutiny. In support of this speculation, FWS cited a single scientific study that did not support the agency's conclusion, but instead documented that grizzlies actually respond to years of poor whitebark pine seed production "by substituting lower-quality foods" and also experience "substantially increase[d] … risk of direct human-caused mortality" due to their movement into more populated areas. Fed. ER 6:1120 (Weaver, et al. (1996)).

Neither the delisting rule nor the administrative record provides a rational basis for this Court to sustain FWS's counterfactual faith in an unprecedented grizzly bear behavioral adaptation. The threat posed by the loss of whitebark pine

trees is even more severe than the previously studied adverse impacts of low-seed-production years on the Yellowstone grizzly population. Instead of a situation in which whitebark seed production is good in some areas while poor in others, Yellowstone's grizzlies face a future in which whitebark seeds are absent throughout the bears' range every year. The district court correctly determined that FWS acted arbitrarily in dismissing the threat posed to Yellowstone grizzly bears by the substantial and ongoing loss of whitebark pine.

Second, FWS violated the Endangered Species Act when it determined that Yellowstone grizzlies were not threatened by inadequate state and federal laws and regulations that will replace the binding protections of the ESA upon delisting. FWS identified two primary threats to the Yellowstone grizzly bears that must be addressed through regulatory mechanisms: excessive human-caused mortality and habitat destruction. Rather than countering these threats with binding "regulatory mechanisms," 16 U.S.C. § 1533(a)(1)(D), FWS relied on the inadequate and entirely voluntary provisions of the Conservation Strategy.

FWS's regulatory mechanisms determination violated the ESA because it relied on unenforceable conservation measures and hortatory goals, rather than enforceable laws and regulations. FWS's determination was also arbitrary because the conservation measures upon which it relied do not adequately limit grizzly bear mortality and habitat degradation such that the protective measures of the ESA are

no longer necessary. Specifically, FWS arbitrarily relied on the Conservation Strategy's mortality thresholds, even though the Strategy contains no standards for maintaining grizzly bear mortality below those thresholds and establishes no actual consequences for exceeding them. FWS also arbitrarily determined that grizzly bears are not threatened by inadequate regulatory mechanisms with respect to habitat, even though 39 percent of the Yellowstone grizzly bears' currently occupied range is entirely without protection.

ARGUMENT

This Court should affirm the district court's determination that FWS's Yellowstone grizzly bear delisting decision arbitrarily and unlawfully dismissed a key threat to the species and overlooked the absence of regulatory mechanisms necessary to protect the grizzly from a host of well-documented threats.

I. STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo. See Suever v. Connell, 579 F.3d 1047, 1055 (9th Cir. 2009). Judicial review of the Yellowstone grizzly bear delisting decision is subject to the standards of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, which call for courts to "set aside" agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," id. § 706(2)(A); see also id. § 706(2)(C); W. Watersheds Project v. Kraayenbrink, Nos. 08-35359 & 08-35360, 2010 WL

3420012, at *6 (9th Cir. Sept. 1, 2010). While this standard generally requires a reviewing court to "defer to an agency's decision that is fully informed and well-considered," the court "need not forgive a clear error of judgment." Ctr. for Biological Diversity v. U.S. Dep't of the Interior, No. 07-16423, 2010 WL 3704200, at *7 (9th Cir. Sept. 23, 2010) (quotations omitted). Moreover, even where an agency with "technical expertise" acts "within its area of competence," a reviewing court "need not defer to the agency when the agency's decision is without substantial basis in fact," as "there must be a rational connection between the facts found and the determinations made." Ariz. Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160, 1163 (9th Cir. 2010), petition for cert. filed (U.S. Oct. 1, 2010) (No. 10-454); see also, e.g., Brower v. Evans, 257 F.3d 1058, 1067 (9th Cir. 2001) ("The presumption of agency expertise can be rebutted when its decisions, while relying on scientific expertise, are not reasoned."). This Court has accordingly "insisted that agencies support and explain their conclusions with evidence and reasoned analysis"—something FWS failed to do in its effort to strip the Yellowstone grizzly population of its Endangered Species Act protections. Ctr. for Biological Diversity, 2010 WL 3704200, at *14 (citing Lands Council v. McNair, 537 F.3d 981, 994, 998 (9th Cir. 2008) (en banc)); see also id. at *16 ("[W]e are not compelled to defer—indeed, we are compelled not to defer—when an agency has acted arbitrarily and capriciously.").

II. FWS FAILED TO RATIONALLY CONSIDER THE ONGOING DEMISE OF THE YELLOWSTONE GRIZZLY BEAR POPULATION'S MOST ESSENTIAL FOOD SOURCE—THE WHITEBARK PINE

Unlike any other grizzly population, the fate of the Yellowstone region's bears is inextricably linked to the fate of whitebark pine trees. See 72 Fed. Reg. at 14,878. As the district court correctly concluded, FWS acted arbitrarily by delisting the Yellowstone grizzly population without rationally considering the ramifications of a dramatic and unprecedented loss of whitebark pine within the Greater Yellowstone Ecosystem. See Greater Yellowstone Coalition, 672 F. Supp. 2d at 1118-20.

A. The Yellowstone Grizzly Bear Population Is Uniquely Dependent Upon The Seeds Of The Whitebark Pine

"Whitebark pine seeds have long been identified as the most significant vegetative food source for grizzly bears in the [Greater Yellowstone Ecosystem] and are, hence, a crucial element of suitable grizzly bear habitat." GYC SER 93 (IGBST (2005)). Whitebark pine seeds provide a significant portion of the nutrition Yellowstone grizzlies need in the fall when they must build up fat reserves for winter hibernation. See 72 Fed. Reg. at 14,867-68, 14,878. Grizzlies obtain whitebark pine seeds by raiding squirrel caches in the remote, high-elevation forests where whitebark pines grow. GYC SER 196 (Mattson, et al. (1992a)). Yellowstone grizzlies consume the pine seeds "extensively" when they

are available. 72 Fed. Reg. at 14,868; Fed. ER 5:818 (Felicetti, et al. (2003)) (in good years, 67 percent of Yellowstone grizzlies derived more than half of their protein from whitebark pine seeds).

When whitebark pine seeds are abundant, Yellowstone grizzlies forage in remote whitebark-pine forests, taking the bears far from human activity and development. GYC SER 196 (Mattson, et al. (1992a)). During years when whitebark pine seeds are scarce, Yellowstone grizzlies are forced to seek alternative foods at lower elevations near human developments, increasing bear-human conflicts. See, e.g., 72 Fed. Reg. at 14,868; GYC SER 196 (Mattson, et al. (1992a)). Increased conflicts mean increased bear mortalities; in poor whitebark years, grizzly bear mortality is 1.8 to 3.3 times greater than in years with good whitebark pine seed production, GYC SER 151 (Mattson (1998)), and 3.3 times as many sub-adult males and 2.3 times as many adult females are killed by humans, GYC SER 177 (Mattson, et al. (1992)). Consequently, "most grizzly bear

mortality in the Yellowstone area, of which virtually all is human-caused, occurs during years of poor pine seed crops." GYC SER 206 (Mattson, et al. (1992a)).[3]

Abundant whitebark pine seeds also provide the nutritional foundation for grizzly bear reproductive success. The high fat content of whitebark pine seeds allows female grizzlies to add the weight needed for reproduction. GYC SER 169 (Mattson (2000)). Accordingly, when whitebark seeds are scarce, the number of grizzly bear litters and the number of cubs per litter decline dramatically. GYC SER 159-64, 169 (Mattson (2000)); see also Fed. ER 5:965 (Schwartz, et al. (2006)) (size of litters). Grizzly population data make clear that there are no ready alternate foods of comparable nutritional value: when whitebark seeds are scarce, Yellowstone grizzlies consume greater quantities of less-nutritious roots to compensate, and grizzly bear cub production declines accordingly. GYC SER 159 (Mattson (2000)).

The net effect of these documented dynamics is that whitebark pine seed availability makes the difference between an increasing or decreasing Yellowstone

[3] While FWS displays a figure demonstrating that across the Yellowstone ecosystem whitebark cone production varies from year to year, FWS Br. at 49, the agency omits the corresponding chart demonstrating that grizzly-human conflicts skyrocket in poor cone-production years. See GYC SER 261 (Mattson, et al. (2001)) (charts showing inverse relationship of whitebark cone production and human-bear conflicts); see also GYC SER 81 (IGBST (1999)) (showing same dynamic and annually updated through 2006 annual report), see GYC SER 91 (demonstrating expression of same dynamic between 1980 and 2004).

grizzly bear population. See Fed. ER 5:911 (Pease and Mattson (1999)).[4] Historically, the population has declined by 5 percent in years when whitebark seeds are relatively scarce and increased by 7 percent in years when seeds are abundant. Id. Whitebark pine seeds have "the greatest potential of any single food-related factor to impact behavior and demography of the Yellowstone grizzly bear population." GYC SER 175 (Mattson, et al. (1992)).

While whitebark pines have been critical for grizzly recovery to date, intensifying mountain pine beetle outbreaks are devastating the trees. 72 Fed. Reg. at 14,928-29; see also GYC SER 272-290 (Merrill (2006)). Historically, beetles were unable to survive Yellowstone's cold winters amongst high-elevation whitebark pines. See 72 Fed. Reg. at 14,929; GYC SER 52-57. However, in recent years, sustained by warmer winter temperatures, the beetles are mounting mass attacks on a tree species that has no natural defenses to beetle attacks. Id. The prognosis for whitebark pine is bleak, and has been borne out on the ground. FWS scientists documented the loss of 23.9 percent of monitored whitebark pine trees in just two years between 2002 and 2004. GYC SER 85 (IGBST (2004)) (6.3

[4] In its brief, FWS launches a post hoc attack on the Pease and Mattson study. FWS Br. at 56. However, the delisting rule approvingly cites the Pease and Mattson study twice, registering no disagreement with its findings. 72 Fed. Reg. at 14,906, 14,912. Even in its appeal brief, FWS cites Pease and Mattson with approval, albeit for a premise at odds with the results of the Pease and Mattson publication. FWS Br. at 53 (contending erroneously that whitebark cone production affects only "the mortality of some individual bears").

percent loss between 2002 and 2003); GYC SER 91 (IGBST (2005)) (an additional 17.6 percent loss between 2003 and 2004).[5] Every single scientific study that has taken recent warming temperatures into account has concluded that whitebark pine will largely be eliminated from the Yellowstone ecosystem within the coming decades. See GYC SER 65-69 (Ferguson (2006)); Fed. ER 5:869-75 (Logan (2006)). FWS acknowledges that these studies represent the best-available science concerning future whitebark pine distribution. See 72 Fed. Reg. at 14,929.[6]

Compounding the mountain pine beetle onslaught, white pine blister rust, a non-native fungus, is also killing whitebark pines and stopping the cone production of still-living trees. See 72 Fed. Reg. at 14,928-29; GYC SER 120-21 (Kendall and Keane (2001)). Approximately 25 percent of whitebark pine trees in the Greater Yellowstone region are currently infected with blister rust, and that number is expected to grow. 72 Fed. Reg. at 14,929. Blister rust both stops cone

[5] Rather than implementing management actions to address these documented losses, however, FWS simply designated additional trees for monitoring—a response primarily focused on monitoring cone production on the remaining live trees in a dying forest. GYC SER 97-98.

[6] The ongoing demise of whitebark pine has exceeded even these dire predictions. See GYC SER 20-21 (Dr. Jesse Logan Rule 59 Decl.) ("I believe that whitebark pine will be functionally extinct in the ecosystem in 5-7 years, surviving only in small, localized areas or as krumholz trees."). Correspondingly, Yellowstone grizzly bear mortalities post-delisting have skyrocketed to levels unseen since the original listing of the grizzly bear in 1975. See GYC SER 11, 15 (48 known and probable grizzly bear mortalities in 2008, extrapolating to an estimated total 2008 mortality of 79 bears (30 independent females; 41 independent males; 8 documented dead dependent young grizzlies), violating two mortality standards).

production of living trees and ultimately kills the host tree. GYC SER 120-21 (Kendall and Keane (2001)). Although blister rust is relatively slow-acting, it is almost always lethal. Id.

As summarized by two leading grizzly bear scientists:

> Virtually all the whitebark pine in this system is projected to be lost either to an exotic pathogen or to global climate warming (Kendall 1995; Mattson et al. 2001). Like Mattson et al. (2001), our results suggest that the apparent robustness of Yellowstone's grizzly bear range is contingent on the presence of abundant whitebark pine. Such vulnerability emphasizes the need for concern over loss of this food and argues for the inadvisability of removing any legal protections for this population.

GYC SER 193 (Mattson and Merrill (2002)).

B. FWS Arbitrarily Declared That Yellowstone's Grizzly Population Is Not Threatened By The Whitebark Pine's Demise

Notwithstanding the overwhelming scientific evidence demonstrating the importance of whitebark pine to the Yellowstone grizzly population and the bleak outlook for this critical food source, FWS shrugged off the whitebark pine issue, concluding that grizzlies are not threatened because they are "opportunistic omnivores that will make behavioral adaptations regarding food acquisition." 72 Fed. Reg. at 14,929-30. In other words, FWS asserted that Yellowstone's grizzly population has sufficient nutritional options to weather the demise of the whitebark pine—despite thirty years of research documenting the adverse impacts that poor whitebark pine seed cone production has uniformly had on grizzly survival and reproduction. See id.

Because FWS's assertion runs "counter to the evidence before the agency," it was arbitrary. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). The sole study FWS cited in the delisting rule to support its adaptation argument—Weaver, et al. (1996)—actually reaches the opposite conclusion. See 72 Fed. Reg. at 14,930. Indeed, the Weaver study determined that bears respond to poor-whitebark-production years "by substituting lower-quality foods" and also experience "substantially increase[d] … risk of direct human-caused mortality" due to their movement into more populated areas. Fed. ER 6:1120. Thus, Weaver, et al. (1996) is consistent with other studies documenting grizzly population declines when whitebark pine seeds are scarce, see Fed. ER 5:911 (Pease and Mattson (1999)), contradicting the delisting rule's arbitrary conclusion that Yellowstone grizzlies will avoid increased mortality rates when whitebark-seed production is severely reduced or entirely eliminated. See Ctr. for Biological Diversity, 2010 WL 3704200, at *14 (agency acted arbitrarily where "[t]here [wa]s nothing in the record supporting" its conclusion and, "[i]nstead, there [wa]s much in the record indicating precisely the opposite").

As evidenced by its reliance on a study at odds with the agency's own conclusions, FWS ultimately failed to offer any rational basis in the delisting rule for its optimism that Yellowstone's grizzlies will somehow adapt to the absence of whitebark pine seeds—despite the bears' inability to do so in thirty years of

study—or that the documented adverse impacts of reduced whitebark pine seed production on grizzly mortality, reproduction, and population numbers will somehow be avoided in the future. See 72 Fed. Reg. at 14,929-30. Instead, in eight separate places in the delisting rule, FWS recognized that whitebark pine productivity influences the frequency of conflicts between humans and Yellowstone grizzlies—conflicts which often result in dead bears—as well as grizzly bear reproductive success. See id. at 14,867, 14,868, 14,890-91, 14,899, 14,916, 14,927, 14,929, 14,932-33. FWS accordingly concluded that whitebark pine productivity "has been linked to grizzly bear survival and reproduction (Mattson et al. 1992, p. 436; Gunther et al. 1997, p. 38; Gunther et al. 2004, p. 15; Mattson 2000, p. 120)." Id. at 14,933; see also id. at 14,868 (during "poor whitebark pine years," there are "higher numbers of human-caused grizzly bear mortalities") (citing Mattson, et al. (1992), p. 436; Gunther, et al. (2004), pp. 13-14).

Indeed, page 436 of Mattson, et al. (1992)—a page cited ten times by FWS in the delisting rule—documents that from 1976 to 1990, more than twice as many adult females (the most important component of the population) died during poor whitebark cone years compared to good years. GYC SER 177; see also GYC SER 107 (Gunther, et al. (2004)) (discussing Mattson, et al. (1992)); 72 Fed. Reg. at 14,871 ("adult female survival [i]s the most important vital rate influencing

population trajectory"). Total human-caused grizzly bear deaths were 1.9 times more frequent in poor whitebark cone years than in good years. GYC SER 177 (Mattson, et al. (1992)). Mattson (2000)—cited by FWS in the delisting rule for the proposition that whitebark cone production affects grizzly bear reproductive rates, see 72 Fed. Reg. at 14,933—documented that the likelihood of female grizzlies producing litters at all and the likelihood of them producing large, three-cub litters, increased when whitebark pine seeds were abundant. GYC SER 169.[7] All of these studies, in addition to the Pease and Mattson (1999) study discussed supra, Fed. ER 5:904-922, show that whitebark pine cone availability profoundly impacts the Yellowstone grizzly bear population—not just "the mortality of some individual bears," as FWS now contends. See FWS Br. at 53; see also Fed. ER 1:66 (district court Rule 59 Order rejecting FWS's post hoc contention that "the studies relied upon … in the Final Rule … document the impact of whitebark pines on individual grizzly bears, not on the entire population of bears").

[7] FWS's reliance on the effect of whitebark pine loss on other grizzly bear populations, FWS Br. at 51, is misplaced because grizzlies elsewhere do not depend on whitebark pine as extensively as they do in the Yellowstone ecosystem. See 72 Fed. Reg. at 14,878 ("[d]ependence of Yellowstone grizzly bears on whitebark pine is unique"). The Yellowstone ecosystem lacks the abundance of berries and fish that are present in other grizzly bear ecosystems. See id. at 14,877 (Yellowstone grizzlies have "less access to fall berries than any other interior North American, European, or Asian grizzly bear" population); id. at 14,905 ("It is this combination of reliance on large mammals and whitebark pine seeds, while having little opportunity to feed on berries, which makes the ecological setting of the [Greater Yellowstone area] unusual, unique, and significant.").

Even the study upon which FWS relies in its brief to dismiss the impact of whitebark-seed availability on grizzly survival rates undermines FWS's "adaptation" theory. See FWS Br. at 52-53, 56. That study—Haroldson, et al. (2006)—concluded that significant loss of whitebark pine:

> would reduce survival rates for bears, especially conflict-prone individuals. Should whitebark pine decline rapidly, we speculate that we would witness a scenario similar to what occurred when dumps were closed in [Yellowstone National Park]: more management problems, particularly outside the [Recovery Zone], with a substantial increase in measurable bear mortality.

Fed. ER 5:985 (Haroldson, et al. (2006b)) (emphases added).

FWS also attempts to dismiss the impact of decreased whitebark seed production on Yellowstone grizzlies by relying on an apparent historic average bear population growth rate over 20 years, while ESA protections were in place. FWS Br. at 51; 72 Fed. Reg. at 14,932. However, neither the study cited in support of this argument—Schwartz, et al. (2006b)—nor any other study cited in the delisting rule analyzed population growth rates for individual years. See Fed. ER 5:1005 (concluding that the Yellowstone grizzly bear population likely increased between 1982 and 2002). Nor did Schwartz, et al. (2006b) analyze whether the Yellowstone grizzly bear population decreased in bad whitebark pine cone production years. See id. Instead, the study calculated only a cumulative growth rate for a 20-year period concluding in 2002. See Fed. ER 5:944, 1005; 72

Fed. Reg. at 14,880-81, 14,932 (acknowledging 2006 study's calculation of cumulative growth rate).[8] Accordingly, there is no basis for FWS's contention that the Yellowstone "grizzly bear population continued to increase at 4-7% per year each year since 1983 [to 2002]." FWS Br. at 50 (emphasis added).[9]

More importantly, there is no basis for an assumption that a 20-year, pre-2003 cumulative population growth rate will continue in the future. The population growth rate on which FWS relies was calculated for 1983-2002, see 72 Fed. Reg. at 14,880, when "whitebark pine seed production … varied dramatically," id. at 14,932. The recent bark beetle infestations devastating Yellowstone whitebark pine began around 2004. See id. at 14,928. Accordingly, FWS's cited Schwartz, et al. (2006b) study did not address the situation that now faces Yellowstone's grizzlies. Instead of a scenario in which the grizzly bear population could rebound in years when whitebark pine cone production is robust, or bears would travel to specific areas where whitebark pines were productive in years when ecosystem-wide seed cone production was down, Yellowstone grizzlies now face a scenario where cone production is universally and unalterably

[8] In the delisting rule and literature cited, FWS often uses references to Harris, et al. (2006) and Schwartz, et al. (2006) interchangeably. Both are contained within the wildlife monograph reproduced at Fed. ER 5:944-1011.

[9] Indeed, given the wide confidence intervals, we do not know with certainty whether the Yellowstone grizzly bear population was even stable, or actually declined, from 1983 to 2002. See GYC SER 247 (van Manen scientific review of proposed delisting rule); see also 72 Fed. Reg. at 14,880-81.

reduced throughout the ecosystem—where the empty cupboard is a chronic condition, not an episodic challenge. See, e.g., GYC SER 78 (IGBST (1999)) ("Cone production was extremely variable both within and among transects."); GYC SER 90 (IGBST (2005)) (showing low whitebark pine cone production within the grizzly recovery zone, but high production outside the zone). By delisting the Yellowstone grizzly population without rationally considering the whitebark pine's demise, FWS acted arbitrarily. See, e.g., State Farm, 463 U.S. at 43; Ctr. for Biological Diversity, 2010 WL 3704200, at *14.

The brave new world that Yellowstone grizzlies now face is one in which every year is a bad food year. See GYC SER 193 (Mattson and Merrill (2002)). Bears will not be able to consume whitebark seeds in some areas in bad cone production years ecosystem-wide—as they have in the past—or feast on abundant whitebark seeds during good years and thereby increase cub production and avoid mortalities. All told, the delisting rule's discussion of the whitebark pine's demise offers nothing more than FWS's counterfactual speculation that the Yellowstone grizzly population will—for the first time ever—adapt to the absence of pine seeds within its range. See 72 Fed. Reg. at 14,930. The present decline and future threats to the Yellowstone grizzlies' most important food source demonstrate that the grizzlies remain threatened by current and projected habitat loss and degradation. See 16 U.S.C. § 1533(a)(1)(A), (E). Because FWS failed to "support

and explain" its contrary conclusion "with evidence and reasoned analysis," Ctr. for Biological Diversity, 2010 WL 3704200, at *14, its delisting decision was arbitrary and appropriately vacated by the district court, see Greater Yellowstone Coalition, 672 F. Supp. 2d at 1119 ("The agency has not articulated a rational connection between the best available science and its conclusion that bears will not be affected by declines in whitebark pine because they are omnivorous."); see also, e.g., Ariz. Cattle Growers' Ass'n, 606 F.3d at 1163 ("[T]here must be a rational connection between the facts found and the determinations made.").

C. FWS Arbitrarily Determined That Unidentified "Management Responses" May Prevent Grizzly Mortality Caused By Declining Whitebark

Despite its insistence that Yellowstone's bears can adapt to the near-elimination of their most important food in ways that the bears have never been able to adapt in the past, FWS ultimately admits that the whitebark pine's demise will result in "larger home range size," "increased conflicts with humans and increased mortality," and "lower reproductive success"—all legitimate threats to Yellowstone's grizzlies. 72 Fed. Reg. at 14,932; see also FWS Br. at 57. In the face of this adversity, FWS suggests that increasing "conflicts can be prevented" through "management responses" pursuant to the agency's Conservation Strategy. FWS Br. at 57-58. However, the Conservation Strategy merely notes the systems in place to document the loss of whitebark pine; there are no thresholds for the loss

of whitebark requiring management response. See Fed. ER 2:197, 199; see also Section III, infra. Moreover, FWS's proposal to react to grizzly bear population declines only after they have been documented through monitoring cannot possibly "prevent[]" substantial grizzly bear mortality. See FWS Br. at 57-58; Brower, 257 F.3d at 1067 (agency deserves no deference for decisions that "are not reasoned").[10] Since population growth rates provide "extremely poor measures of population safety or health under conditions of ongoing habitat degradation[,]" and a significant population decline is likely to be expressed 8 to 13 years after habitat degradation, Fed. ER 5:806 (Doak (1995)), this approach is particularly misguided here. The agencies' response to the unfolding demise of whitebark pine in the Yellowstone ecosystem fails to match their "adaptive management" rhetoric.

III. THE YELLOWSTONE GRIZZLY BEAR POPULATION REMAINS THREATENED BECAUSE OF INADEQUATE REGULATORY MECHANISMS

FWS's determination that Yellowstone grizzly bears are not threatened due to "the inadequacy of existing regulatory mechanisms," notwithstanding the lack of regulatory measures to address the documented threats of excessive grizzly mortality and habitat degradation was also arbitrary and contrary to the ESA. See 16 U.S.C. § 1533(a)(1)(D); see 72 Fed. Reg. at 14,926.

[10] In its brief, FWS even seeks to rely on "ongoing whitebark pine restoration efforts," FWS Br. at 18, despite the infancy of such efforts and the fact that whitebark pines do not produce robust cone crops until they reach 120-150 years of age, see GYC SER 58-59.

Since the original ESA listing of the grizzly in 1975, FWS has repeatedly recognized the need for binding conservation measures to secure Yellowstone grizzlies from the threats that led to their decline. See, e.g., 40 Fed. Reg. at 31,734; 72 Fed. Reg. at 14,871, 14,911; see also FWS Br. at 16 (conceding need for "strict mortality limits and … legally enforceable habitat standards"). In FWS's words, "[t]he lack of regulatory mechanisms to control take and protect habitat was a contributing factor to grizzly bear population declines." 72 Fed. Reg. at 14,922. Indeed, in determining that delisting of the Yellowstone population was appropriate, FWS admitted that the binding protections of the Endangered Species Act "improved the status of the Yellowstone grizzly bear population." Id. (citations omitted); see also FWS Br. at 2 (stating that the Yellowstone population grew and expanded its range "[u]nder the Act's legal protection").

Yet FWS's delisting decision removed the very regulatory measures the agency touted as the reason the bear's status had improved. See, e.g., 50 C.F.R. § 17.40(b)(1) (grizzly bear protective regulations). Under the ESA, FWS was required to analyze whether, in lieu of the ESA's robust legal safety net, non-ESA state and federal "regulatory mechanisms" would protect Yellowstone grizzly bears against the excessive mortality and habitat loss that drove their decline. See 16 U.S.C. § 1533(a)(1)(D); see also FWS Br. at 16 (acknowledging that the Conservation Strategy underlying FWS's delisting decision was developed

"[b]ecause the lack of adequate mortality and habitat standards contributed to the grizzly bear[']s decline and ultimate listing").

Instead of undertaking this statutorily required analysis, FWS committed legal error. First, FWS unlawfully relied on voluntary measures, rather than laws and regulations, in considering whether Yellowstone grizzly bears are threatened by "the inadequacy of existing regulatory mechanisms." 16 U.S.C. § 1533(a)(1)(D) (emphasis added); see 5 U.S.C. § 706(2)(A) (agency action must be set aside if it is "not in accordance with law"). Second, FWS arbitrarily left unaddressed two of the biggest threats still facing Yellowstone grizzlies: excessive mortality and habitat destruction. See 5 U.S.C. § 706(2)(A) (agency action must be set aside if it is "arbitrary").

A. The Conservation Strategy Is Not A "Regulatory Mechanism"

FWS's determination that regulatory mechanisms are adequate was largely based on a vague and unenforceable Conservation Strategy. See FWS Br. at 22; 72 Fed. Reg. at 14,873. The Conservation Strategy focuses on a designated grizzly bear Primary Conservation Area situated at the core of the Yellowstone region, which includes only 61 percent of occupied grizzly bear habitat. See Fed. ER 2:161, 186-92, 5:941 (Schwartz, et al. (2006b)). FWS's reliance on the Conservation Strategy in its section 4(a)(1)(D) analysis was contrary to the plain language of the ESA because it is voluntary, rather than "regulatory," as required

by the ESA. 16 U.S.C. § 1533(a)(1)(D); see Greater Yellowstone Coalition, 672 F. Supp. 2d at 1116.

1. "Regulatory Mechanisms" Are Binding, Enforceable Measures

The ESA establishes a disjunctive test for determinations whether to list a species as threatened or endangered. See 16 U.S.C. § 1533(a)(1). FWS must determine whether a species is threatened or endangered due to "any one or a combination" of five factors that may negatively impact a species, in both listing and delisting decisions. 50 C.F.R. § 424.11(c), (d) (emphasis added); see also 16 U.S.C. § 1533(a)(1) (requiring FWS to "determine whether any species is … a threatened species because of any of the [five listing] factors") (emphasis added). The fourth of these factors requires FWS to consider whether a species is endangered by "the inadequacy of existing regulatory mechanisms" alone. 16 U.S.C. § 1533(a)(1)(D); see Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302 (9th Cir. 1991) ("A species may also be listed simply because of 'the inadequacy of existing regulatory mechanisms' to protect it.").

Interpreting "regulatory mechanisms" to mean enforceable management provisions is required by the ordinary meaning of the phrase. See Perrin v. United States, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). To "regulate" means "to govern or direct

according to rule[;] … to bring under the control of law or constituted authority." Webster's Third New Int'l Dictionary 1913 (1966); see also Black's Law Dictionary 1156 (5th ed. 1979) (defining "regulate" as "[t]o fix, establish, or control; to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws"). The plain language of ESA section 4(a)(1)(D) thus requires that FWS focus on binding protections—not voluntary measures or unenforceable aspirations—in determining whether a species is threatened by "the inadequacy of existing regulatory mechanisms." 16 U.S.C. § 1533(a)(1)(D). FWS's interpretation of "regulatory mechanisms" to mean unenforceable, voluntary measures accordingly contradicts the ESA's plain meaning and is not entitled to deference. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) ("[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").[11]

As FWS conceded, the Conservation Strategy is a voluntary measure that "cannot legally compel any of the signatories to implement management policies

[11] Because section 4(a)(1)(D) is not ambiguous as FWS contends, there is no merit to the agency's attempted reliance on Trout Unlimited v. Lohn, 559 F.3d 946, 960 (9th Cir. 2009) (rejecting argument that "simply f[ound] no grounding in the statutory text of the ESA"), and Butte Environmental Council v. U.S. Army Corps of Engineers, 607 F.3d 570 (9th Cir. 2010), amended and superseded by, 2010 WL 3420071, at *8-9 (9th Cir. Sept. 1, 2010) (concluding that the defendant agency had not applied a regulation previously invalidated by this Court as contrary to "'Congress's express command'"). See FWS Br. at 36 (citing cases).

or obligate funding." 72 Fed. Reg. at 14,904; see id. at 14,873. Nevertheless, FWS contends that "the various Federal agencies' and State governments' signatures on the Strategy clearly indicate their intention to manage grizzly bears according to the Strategy." Id. at 14,904 (emphasis added). However, the road to extinction is paved with good intentions; the ESA requires more. Courts that have considered this issue—including the district court in this case—have correctly held that "[a]n 'intention' or 'commitment' to manage [a species] a certain way is not a regulatory mechanism" that may be considered under section 4(a)(1)(D). Greater Yellowstone Coalition, 672 F. Supp. 2d at 1116; see also Or. Natural Res. Council v. Daley, 6 F. Supp. 2d 1139, 1155 (D. Or. 1998) (regulatory mechanisms require "some method of enforcing compliance"); Ctr. for Biological Diversity v. Morgenweck, 351 F. Supp. 2d 1137, 1141 (D. Colo. 2004) (holding that FWS improperly relied on actions described in conservation agreement with states to reject ESA listing of fish species, where "[t]he Conservation Agreement does not legally bind the states to implement such actions").[12]

[12] FWS's unprecedented argument that "almost every [ESA] provision" vests the agency with unbridled discretion overstates the sole case citation offered to support it. See FWS Br. at 43. In Fund for Animals v. Rice, 85 F.3d 535, 547 (11th Cir. 1996), the Eleventh Circuit found that FWS enjoyed broad discretion only under ESA section 4(f), 16 U.S.C. § 1533(f), which "provid[es] general guidance as to what is required in [an ESA] recovery plan," and permits FWS to forego recovery planning altogether in certain circumstances. No such discretion attends FWS's statutory duty to determine species imperilment based on, among other factors, "the inadequacy of existing regulatory mechanisms." 16 U.S.C. § 1533(a)(1)(D).

Contrary to FWS's argument, FWS Br. at 35-36, this Court's decision in Tucson Herpetological Society v. Salazar, 566 F.3d 870, 881 (9th Cir. 2009), does not establish a different rule. This court held in Tucson Herpetological Society that FWS "did not err in taking … into account" a voluntary conservation agreement in considering threats to a species' range where the agency had looked to the agreement for only "limited benefits" to the species and where FWS was able to identify "specific conservation benefits that the agreement ha[d] achieved since it came into being." Id. However, the Court did not hold that a voluntary agreement was a regulatory mechanism under section 4(a)(1)(D), and indeed, did not appear to even consider that issue. See id. This Court is squarely presented with that question for the first time in this case. Because it is contrary to the plain language of the ESA, this Court should reject defendants' attempt to rewrite the "regulatory mechanisms" requirement of section 4(a)(1)(D) to include non-regulatory state and federal efforts, intentions, and aspirations. See 5 U.S.C. § 706(2)(A); Chevron, 467 U.S. at 842-43.

2. The Conservation Strategy Does Not Eliminate The Need For Adequate Regulatory Mechanisms

In the absence of adequate, binding "regulatory mechanisms," defendants retreat to a separate ESA provision authorizing FWS to "tak[e] into account, those

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See Biodiversity Legal Found. v. Norton, 285 F. Supp. 2d 1, 13-14 (D.D.C. 2003) (declining to extend Rice).

efforts, if any, being made by any State … to protect such species." 16 U.S.C. § 1533(b)(1)(A); see FWS Br. at 39-40; Wyo. Br. at 23-25; Mont. Br. at 11-12; Safari Club Br. at 22-25.[13] However, in contrast to these litigation arguments, the delisting rule itself considered the Conservation Strategy as a "regulatory mechanism" under ESA section 4(a)(1)(D), not a conservation "effort" under section 4(b)(1)(a). See 72 Fed. Reg. at 14,922-26.

Yet even if FWS had considered the voluntary Conservation Strategy under section 4(b)(1)(A)—which it did not—it could not rationally conclude that the Strategy would ameliorate the threats to Yellowstone grizzly bears such that enforceable protections are not necessary. As FWS itself has stated, "[t]he certainty that [a] conservation effort will be effective" largely depends on whether "[t]he steps necessary to implement the conservation effort are identified in detail." 68 Fed. Reg. 15,100, 15,115 (Mar. 28, 2003). As described below, the Conservation Strategy's failure to identify concrete measures—or even

[13] Defendants' alternate suggestion that Congress intended the "regulatory mechanisms" analysis to be co-extensive with the ESA's section 4(b)(1)(A) consideration of other "efforts" to conserve species flies in the face of bedrock statutory construction principles. See, e.g., FWS Br. at 39-40. Congress added both the 4(a)(1)(D) "regulatory mechanisms" language and the 4(b)(1)(A) other "efforts" language to existing law when it enacted the ESA in 1973. Pub. L. No. 93-205, §§ 4(a)(1), 4(b)(2) (1973). Under FWS's construction, adoption of the 4(b)(1)(A) language would have eliminated any need for the 4(a)(1)(D) "regulatory mechanisms" language. This Court should not accept such a reading of the statutory text "that makes part of it redundant." Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 669 (2007).

guideposts—to limit grizzly mortality or protect essential bear habitat outside the PCA renders it an arbitrary basis for determining that non-regulatory "efforts" sufficiently reduced threats to Yellowstone grizzly bears to justify the elimination of ESA protections for the species.

B. FWS Arbitrarily Determined That Yellowstone Grizzlies Are Not Threatened By The Inadequacy Of Mechanisms To Regulate Bear Mortality

1. No Regulatory Mechanisms Exist To Prevent Grizzly Bear Mortality

FWS acknowledged that "management of human-caused mortality of grizzly bears is key to successful maintenance of the grizzly bear population in the Greater Yellowstone Area" and, as a result, "[m]ortality limits are a necessary tool for managers." Fed. ER 2:178 (Conservation Strategy); see also 72 Fed. Reg. at 14,871 ("[m]ortality control is a key part of any successful management effort"). FWS arbitrarily determined that existing protections are adequate notwithstanding the absence of any regulatory mechanisms to limit grizzly bear mortality. See 72 Fed. Reg. at 14,922-26.

FWS's regulatory mechanisms evaluation in the delisting rule contains no reference to state or federal laws or regulations that limit grizzly bear mortality. See id. To the contrary, the only references to state laws influencing grizzly bear mortality are laws and regulations that specifically allow people to kill bears. See id. at 14,926. For example, Montana's "defense-of-property" law allows any

person to kill a grizzly bear that is "in the act" of attacking or killing livestock. See id.; Mont. Code Ann. § 87-3-130(1). Indeed, in contrast to FWS's recent determination that sufficient measures are in place to protect grizzlies after delisting, in 1996, the Interior Department's own Solicitor's Office recognized that Montana's law allowing a person to kill a grizzly bear that is attacking or killing livestock is an inadequate regulatory mechanism because the law "places no upper limit on human-caused mortality." GYC SER 297 (discussing Mont. Code Ann. § 87-3-130(1)); see also GYC SER 37 (FWS briefing document stating that Montana law must be changed, "because this law, as currently written, would not allow the state to manage and limit grizzly mortality numbers"); GYC SER 61 (FWS e-mail explaining that Wyoming and Montana "both need to change state law to allow them to control bear mortality upon delisting"). Although Montana has since modified its law, it retained the critical defect noted by the Solicitor: the absence of any mechanism or authority to limit bear killing in defense of property. See GYC SER 297-98; Mont. Code Ann. § 87-3-130.[14] FWS's determination that the

[14] Montana contends that hunting quotas can be reduced if defense-of-property killing is unexpectedly high. Mont. Br. at 20-21. This statement not only offers a rationale that FWS never adopted in the delisting rule, but also ignores the reality that, even without hunting or defense-of-property killing, the Yellowstone population has suffered from mortality nearing FWS's recovery thresholds and exceeded FWS's adult female mortality thresholds in 2004 and 2005. 72 Fed. Reg. at 14,879. As the Interior Solicitor previously recognized, limitations on hunting mortality do not prevent a situation where defense-of-property killing alone "could

Yellowstone grizzly population is not threatened under the statute was accordingly arbitrary. See State Farm, 463 U.S. at 43 (agency must articulate "a rational connection between the facts found and the choice made") (quotations omitted).

FWS further touts state regulation of grizzly bear hunting, which would confine the killing of bears to designated seasons and specified bag limits. See 72 Fed. Reg. at 14,926. However, even if hunting a grizzly bear population already imperiled by the loss of its key food source was somehow consistent with its conservation, Montana, Idaho, and Wyoming laws establish no upper limit on the amount of grizzly bear mortality that may be allowed, through hunting or any other means. See, e.g., Mont. Code Ann. §§ 87-5-301, 87-5-302; Idaho Code § 36-408; Wyo. Stat. Ann. §§ 23-1-101(a)(xii), 23-1-302(a)(i), (ii). This failure to limit grizzly bear mortality is one that the Interior Solicitor previously determined "could endanger maintenance of a recovered bear population" in considering Montana's defense-of-property law. GYC SER 297. FWS has provided no explanation for why the Interior Solicitor's 1996 conclusion is no longer valid. The delisting rule was accordingly arbitrary and capricious. See State Farm, 463 U.S. at 43.

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result in the mortality limits of a recovered population being exceeded." GYC SER 297.

2. The Conservation Strategy Does Not Prevent Excessive Grizzly Bear Mortality

In the absence of any regulatory mechanism to prevent excessive grizzly bear mortality, FWS relies on the non-regulatory Conservation Strategy. See FWS Br. at 22-46; 72 Fed. Reg. at 14,922-26. Even if the Conservation Strategy had been properly considered as a conservation "effort" under section 4(b)(1)(a), 16 U.S.C. § 1533(b)(1)(A), that could reduce the need for regulatory mechanisms, it is entirely insufficient to do so.

First, even if the Conservation Strategy were binding on its signatories—which it is not—the only state parties to the agreement do not have the authority to implement it. While the Montana, Idaho, and Wyoming game management agencies "indicate[d] their intention to manage grizzly bears according to the Strategy," 72 Fed. Reg. at 14,904; see also Fed. ER 2:159-60 (Conservation Strategy signatures), these state agencies cannot bind their respective fish and game commissions, which have exclusive state-law authority to adopt rules and regulations for grizzly bear management and to authorize hunting levels. See Mont. Code Ann. § 87-1-301; Idaho Code §§ 36-102, 36-104; Wyo. Stat. Ann. §§ 23-1-302, 23-1-401. FWS acted arbitrarily in disregarding this problem. See State Farm, 463 U.S. at 43.

Second, FWS arbitrarily relies on the Conservation Strategy's "mortality limits," FWS Br. at 23, which are nowhere incorporated into binding state or

federal laws or regulations, and do not actually "limit" anything. As described in the delisting rule and FWS's brief, there is no consequence of exceeding "mortality limits" in any single year. 72 Fed. Reg. at 14,925; FWS Br. at 10, 13-14, 30-31. Under these standards, the entire population could be killed in a single year without triggering scrutiny. See 72 Fed. Reg. at 14,925. If mortality exceeds FWS's "limits" for two or three consecutive years (depending on which standard is exceeded), it would trigger a "Biology and Monitoring Review." Id. Through this process, a "Coordinating Committee," which has no independent regulatory authority, would determine whether to recommend management changes or petition FWS to relist the grizzly bear. See id.; see also infra. In other words, under the Conservation Strategy, even multiple years of excessive grizzly bear mortality would not mandate necessary management changes. Further, while the Conservation Strategy describes a complex monitoring protocol to determine whether mortality limits have been exceeded, Fed. ER 2:178-81, 273-76, as the district court correctly determined, "monitoring itself does nothing to protect the grizzly bear population." Greater Yellowstone Coalition, 672 F. Supp. 2d at 1115. FWS's contrary contention was arbitrarily at odds with the record. See State Farm, 463 U.S. at 43.

Third, although FWS's brief references the Conservation Strategy's supposed "conflict prevention" measures, the Conservation Strategy does not set

forth conflict prevention measures, and instead relies on state and federal laws as the authority for these activities. FWS Br. at 23; Fed. ER 2:155 ("The management of grizzly bear/human conflicts inside the PCA is based upon the existing laws and authorities of the state wildlife agencies and federal land management agencies."); see also Fed. ER 2:204 (same). No such laws require conflict prevention activities; in its ten-page summary of "existing authorities," the Conservation Strategy identifies a single regulation applicable to conflict prevention. See Fed. ER 2:215, 218. That regulation—36 C.F.R. § 261.50—authorizes forest supervisors to implement discretionary area closures and restrictions and to issue discretionary food and carcass storage orders. Neither the Forest Service regulation nor the Conservation Strategy describe (let alone dictate) what circumstances would trigger the exercise of such discretionary authority, and the delisting rule itself arbitrarily fails to discuss the issue. See id.; 72 Fed. Reg. at 14,922-26, 14,933-34. In sum, the Conservation Strategy does nothing to offset the absence of essential regulatory mechanisms limiting grizzly bear mortality within the Greater Yellowstone region. Accordingly, FWS's determination that Yellowstone grizzly bears are not threatened by the inadequacy of regulatory mechanisms with respect to grizzly bear mortality was arbitrary. See 16 U.S.C. § 1533(a)(1)(D); State Farm, 463 U.S. at 43.

C. FWS Arbitrarily Determined That Yellowstone Grizzlies Are Not Threatened By The Inadequacy Of Mechanisms To Protect Grizzly Bear Habitat Outside Of The PCA

FWS's determination that regulatory mechanisms are adequate to protect grizzly bear habitat is also arbitrary because no regulatory protection whatsoever applies to the 39 percent of currently occupied grizzly range that falls outside of the PCA. See Fed. ER 5:941 (Schwartz, et al. (2006b)).

1. Lands Outside The PCA Are Critical To Grizzly Bear Recovery

While FWS argues that lands outside the PCA are not necessary for grizzly bear recovery, FWS Br. at 26, the record demonstrates otherwise. FWS relied on bears occupying a large portion of this habitat outside the PCA in concluding that the Yellowstone population has satisfied recovery standards. See, e.g., 72 Fed. Reg. at 14,871-72, 14,935. In fact, FWS's recovery standards require documentation of 15 female bears with cubs within the PCA and a 10-mile zone surrounding the PCA. Id. FWS never explained why no habitat protections were needed for a significant portion of the bears the agency relied on to declare victory with respect to grizzly population levels. Further, FWS admits that between 10 and 16 percent of female grizzly bears with cubs occupy habitat outside the PCA. Id. at 14,874. The loss of these female grizzly bears alone would easily exceed the Conservation Strategy's 9-percent mortality threshold for independent females. See id. at 14,872; see also id. at 14,871 ("adult female survival [i]s the most

important vital rate influencing population trajectory"). Indeed, despite failing to ensure the security of occupied lands beyond the PCA boundary, FWS recognized that suitable habitat outside the PCA is a significant portion of the Yellowstone grizzly's range. See id. at 14,919.

These lands will only become more essential for grizzlies in coming years. FWS's own scientists recognize that, as global warming allows bark beetles to decimate most stands of whitebark pine within Yellowstone National Park and the core of the PCA, the carrying capacity of the PCA will decrease, forcing bears to forage in areas outside the PCA. See GYC SER 63. As the lead grizzly bear scientist for the federal government put it:

> We know the major foods in the GYE are likely to decline. The net result of this decline is a lower carrying capacity for grizzly bears in the GYE. To ensure that there is an adequate number of healthy individuals and hence a healthy population likely will require a larger area than currently defined by the recovery zone. Protecting these lands before they are drastically altered by human impacts is important to ensure the long term conservation of the bears.

Id. (Chuck Schwartz, Leader, Interagency Grizzly Bear Study Team). Indeed, in recent years an increasing portion of the Yellowstone grizzly population is using lands outside the PCA. Fed. ER 5:983 (Haroldson, et al. (2006)). In casting aside non-PCA habitat as insignificant for Yellowstone grizzly bears, FWS arbitrarily failed to consider the critical importance of non-PCA lands presently and their increasing significance with the decline of whitebark pine. See State Farm, 463

U.S. at 43 (agency decision "arbitrary and capricious if the agency has … failed to consider an important aspect of the problem").

2. No Regulatory Mechanisms Exist To Protect Non-PCA Grizzly Bear Habitat

Despite its importance to the Yellowstone grizzly population's survival, no regulatory mechanisms are in place to protect occupied grizzly bear habitat outside the PCA. See 72 Fed. Reg. at 14,923-25. More than half of occupied grizzly habitat on National Forest lands outside the PCA is open to full-field oil and gas development. GYC SER 40. More than 75 percent of occupied National Forest lands are open for road building, see id., despite reams of evidence that open roads greatly increase the likelihood of bear mortality, see, e.g., GYC SER 228 (1993 Grizzly Bear Recovery Plan stating that "[r]oads probably pose the most imminent threat to grizzly habitat today") (citation omitted); GYC SER 145 (Mace, et al. (1996)) ("[grizzly] survival will decrease as traffic levels, road densities, and human settlement increases").

FWS nonetheless argues that bears are adequately protected outside the PCA because more than half of National Forest lands outside the PCA that FWS deemed "suitable" for grizzlies are either U.S. Forest Service inventoried roadless areas or congressionally designated wilderness. See FWS Br. at 27; 72 Fed. Reg. at 14,917. However, FWS arbitrarily disregards the fact that these designations failed to prevent population declines of more than 12 percent per year outside the PCA

between 1983 and 2002—even before the current whitebark pine crisis. See Fed. ER 5:1001 (Schwartz, et al. (2006e)). FWS cannot legitimately rely on the mere fact of roadless and wilderness designations to safeguard the non-PCA grizzly population when the designations have not done so in the past.

Moreover, with the decline in whitebark pine, carrying capacity both within and outside the PCA will be substantially reduced, resulting in higher grizzly mortality rates within the PCA and pushing more of the Yellowstone grizzly population onto unprotected lands outside the PCA. See id. (mortality rate outside PCA will increase as whitebark declines); GYC SER 63 (decline in foods diminishes the Yellowstone region's carrying capacity). The restrictions cited by FWS have not historically prevented high grizzly bear mortality levels outside the PCA, and future conditions will surely magnify this dynamic.[15]

FWS points out that 76 percent of suitable grizzly bear habitat outside of the PCA is National Forest land, where grizzly bears are designated a "sensitive wildlife species." FWS Br. at 28; 72 Fed. Reg. at 14,917; Fed. ER 2:185 (Conservation Strategy). While FWS cites the Forest Service Manual direction to line officers not to approve projects that would "result in loss of species viability,"

[15] FWS also overlooks the uncertainty of legal protections for roadless areas. Although FWS apparently relied on the protections of the U.S. Forest Service's 2001 Roadless Area Conservation Rule, 36 C.F.R. §§ 294.10-14, in a 2008 ruling now on appeal to the Tenth Circuit, the federal district court in Wyoming invalidated the Roadless Rule and enjoined its implementation. See Wyoming v. U.S. Dep't of Agric., 570 F. Supp. 2d 1309 (D. Wyo. 2008).

FWS Br. at 27, the Forest Service Manual does not "have the independent force and effect of law," W. Radio Serv. Co. v. Espy, 79 F.3d 896, 901 (9th Cir. 1996). Furthermore, the Forest Service repealed the 1982 regulatory requirement that the agency must maintain species "viability." See 36 C.F.R. § 219.35, App. B ¶ 2.[16] Consequently, neither a "sensitive species" designation nor the discarded viability standard could reasonably be determined to ensure long-term habitat protection.

3. The Conservation Strategy Does Not Protect Essential Non-PCA Grizzly Bear Habitat

In the absence of regulatory mechanisms to protect grizzly bear habitat outside of the PCA, FWS places faith in state "commitments" to implement the Conservation Strategy's habitat provisions. FWS Br. at 30. However, the Conservation Strategy has no habitat standards for non-PCA lands, so commitments to implement the Conservation Strategy do nothing to protect non-PCA grizzly bear habitat. See Fed. ER 2:185-86. Furthermore, state game agencies—the only state signatories to the Conservation Agreement, Fed. ER 2:159—have no land management authority over federal lands. State management plans include mere intentions to "work with land management agencies to monitor

[16] The "viability" requirement was not in place under the 2005 Forest Planning Rule that was in effect at the time of FWS's grizzly bear delisting decision, see 70 Fed. Reg. 1,023, 1,029 (Jan. 5, 2005), and it is not in place under the interim provisions of the 2000 Forest Planning Rule that are in effect today, see 36 C.F.R. § 219.35, App. B ¶ 2; 74 Fed. Reg. 67,059, 67,060-61 (Dec. 18, 2009) (clarifying that transition provisions of the 2000 Forest Planning rule apply).

habitat changes" and "recommend that land-management agencies manage for an open-road density of one mile or less per square mile of habitat." Fed. ER 3:350 (Montana Plan EIS) (emphasis added); see also Fed. ER 3:470 (Wyoming Game and Fish Department "has no direct jurisdiction over land management activities on a majority of the land adjacent to the [PCA]," so it will merely "encourage land management agencies to consider the grizzly bear in their land management plans"); Fed. ER 3:512 (Idaho's Department of Fish and Game "will encourage the public land management agencies in implementing existing management direction in land use plans"). Accordingly, neither the Conservation Strategy nor state management plans include any habitat protection measures for non-PCA lands that could eliminate the need for adequate regulatory mechanisms.

Because FWS relied on occupied grizzly bear habitat outside of the PCA to establish compliance with its demographic recovery goals yet failed to ensure that regulatory mechanisms are in place to address threats to this essential habitat, FWS's delisting determination was arbitrary and capricious. 16 U.S.C. § 1533(a)(1)(D); see State Farm, 463 U.S. at 43 (agency decision "arbitrary and capricious if the agency has … failed to consider an important aspect of the problem").

D. The Conservation Strategy's Grab Bag Of State And Federal Laws Does Not Demonstrate Adequate Regulatory Mechanisms

As demonstrated above, FWS failed to identify adequate regulatory mechanisms to address the two key threats it identified for the Yellowstone grizzly bear population: excessive mortality and habitat decline. In the absence of such mechanisms, FWS asks this Court to peruse a list of "more than 70 State and Federal laws, regulations, rules, and guidelines," in hopes that something on the list will support its "regulatory mechanisms" determination. 72 Fed. Reg. at 14,926; see also FWS Br. at 31-32 (declaring that the 73 listed laws, "[t]aken together," somehow ensure the population's survival); Fed. ER 2:215-25 (Conservation Strategy). However, FWS arbitrarily failed to provide any analysis in support of this exercise in the delisting rule. As the district court correctly noted, "the Final Rule … does not include any analysis of how or why these various laws will be adequate to protect a recovered population. The Conservation Strategy … too neglects to analyze how these laws would or would not be adequate regulatory mechanisms." Greater Yellowstone Coalition, 672 F. Supp. 2d at 1115 (emphasis added); see Fed. ER 2:215-25 (Conservation Strategy). In other words, FWS arbitrarily failed to articulate a rational justification for its conclusion. See Ctr. for Biological Diversity, 2010 WL 3704200, at *14 (noting that this Court has "insisted that agencies support and explain their conclusions with evidence and reasoned analysis").

FWS complains that its explanation need not be "exhaustive," and it urges this Court to uphold its decision so long as "'the agency's path may reasonably be discerned.'" FWS Br. at 32 (quoting Pub. Citizen v. Nuclear Regulatory Comm'n, 573 F.3d 916, 923 (9th Cir. 2009)). The problem for FWS is that it provided no explanation, let alone an "exhaustive" explanation, for its determination that the laundry list of legal authorities constitutes adequate regulatory mechanisms. See 72 Fed. Reg. at 14,922-26; Getty v. Fed'l Savings & Loan Ins. Corp., 805 F.2d 1050, 1057 (D.C. Cir. 1986) (holding that a "conclusory recitation" failed to satisfy a statutory requirement that the agency "consider" a specified factor).[17]

Nor is FWS's determination self-explanatory. The agency's list of authorities includes the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., and the Montana Environmental Policy Act ("MEPA"), Mont. Code Ann. § 75-1-101, et seq., Fed. ER 2:216, 223, which are information-generating, disclosure statutes that do not impose any substantive protections that could possibly ensure the viability of the Yellowstone grizzly population. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989) (NEPA imposes no substantive environmental protections; total destruction of a deer herd would be

[17] Contrary to the government's assertion in its brief, the problem with FWS's list of laws and regulations is not a failure on the agency's part to "speculate how each and every sovereign might or might not enforce its laws and regulations." FWS Br. at 32. Rather, it is FWS's failure to explain how the listed laws and regulations would protect the Yellowstone grizzly population even if they were enforced.

permissible in spite of a NEPA analysis). Indeed, in a recent finding that inadequate regulatory mechanisms warranted the listing of a northern Rockies fish species, FWS itself acknowledged that NEPA and MEPA "do[] not specifically require … minimization or mitigation measures" to protect species. 75 Fed. Reg. 54,708, 54,737 (Sept. 8, 2010). The agency's laundry list also includes the Multiple-Use Sustained-Yield Act, 16 U.S.C. § 528 et seq., Fed. ER 2:216—a general mandate that "breathes discretion at every pore," Perkins v. Bergland, 608 F.2d 803, 807 (9th Cir. 1979)—and Forest Planning regulations that are now defunct, Fed. ER 2:218 (citing 36 C.F.R. § 219.27). FWS's unexplained reliance on this list of "existing authorities" cannot support its determination that the Yellowstone grizzly population is no longer threatened by "the inadequacy of existing regulatory mechanisms." 16 U.S.C. § 1533(a)(1)(D); see Getty, 805 F.2d at 1057; State Farm, 463 U.S. at 43.[18]

[18] Montana attempts to shore-up FWS's superficial analysis through a discussion of state regulations in its brief. See Mont. Br. at 18-22. This post hoc effort notwithstanding, general direction to manage wildlife species "in a manner that prevents the need for [ESA] listing," Mont. Code Ann. § 87-1-201, and a state "policy" to manage grizzly bears "as a rare species of Montana wildlife," id. § 87-5-301, simply restate similar aspirations in the Conservation Strategy. These vague provisions do not set forth conservation duties or standards and accordingly are not adequate regulatory mechanisms to ameliorate identified threats to grizzly bears.

E. FWS Acted Arbitrarily In Relying On The Prospect Of Future Relisting As Reason To Disregard The Threats Now Confronting Yellowstone's Grizzlies

Finally, FWS attempts to take refuge in a "Biology and Monitoring Review" process "[t]o ensure that the population and habitat standards are met." FWS Br. at 30-31; see also id. at 10, 13-14, 23; 72 Fed. Reg. at 14,925. Such a review "is generally triggered by negative deviations from … population, mortality reduction, and habitat parameters"—in other words, by the population's decline below FWS's recovery floor. Fed. ER 2:214 (Conservation Strategy). The review could also form the basis for a petition to relist Yellowstone grizzly bears. Id.; see 72 Fed. Reg. at 14,925. However, commencement of a status review is no guarantee that the grizzly bear will be relisted, or that it will be relisted in time to reverse a declining population trajectory. For example, for nearly two decades, FWS has failed to list grizzly bear populations in the North Cascades, Cabinet-Yaak, and Selkirk Ecosystems as endangered even after FWS found the populations are nearing extinction and endangered listing is warranted. See 72 Fed. Reg. at 14,874 (listing Federal Register findings).[19] In any event, the ESA cannot reasonably be read to permit delisting on the grounds that relisting would be considered if the species is not adequately conserved; if that were all the ESA required, a species

[19] At least 34 species have gone extinct while awaiting ESA listing. See Susan D. Daggett, NGOs as Lawmakers, Watchdogs, Whistle-blowers, and Private Attorneys General, 13 Colo. J. Int'l Envtl. L. & Pol'y 99, 110-11 (2002).

could always be delisted upon satisfying a biological recovery standard regardless of the inadequacy of existing regulatory measures to ensure its continued viability. But see 16 U.S.C. § 1533(a)(1)(D). Relisting is not a regulatory mechanism; relisting results from the demonstrated failure of regulatory mechanisms. FWS's determination that the Yellowstone grizzly population is no longer threatened by the "the inadequacy of existing regulatory mechanisms" was arbitrary and contrary to the ESA. See id.

CONCLUSION

For the foregoing reasons, appellee Greater Yellowstone Coalition respectfully requests that this Court affirm the judgment of the district court.

Respectfully submitted this 18th day of October, 2010.

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,618 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman.

Dated: October 18, 2010

s/ Douglas L. Honnold

STATEMENT OF RELATED CASES

Appellee Greater Yellowstone Coalition is unaware of any related case pending in this Court.

s/ Douglas L. Honnold

Addendum

Except for the following, all pertinent statutes, etc., are contained in the addendum of federal defendants.

36 C.F.R. § 219.35, App. B.

Interpretative Rule Related to section 219.35(a) and (b)

The Department is clarifying the intent of the transition provisions of paragraphs (a) and (b) of Sec. 219.35 with regard to the consideration and use of the best available science to inform project decisionmaking that implements a land management plan as follows:

1. Under the transition provisions of paragraph (a), the responsible official must consider the best available science in implementing and, if appropriate, in amending existing plans. Paragraph (b) allows the responsible official to elect to prepare plan amendments and revisions using the provisions of the 1982 planning regulation until a new final planning rule is adopted.

2. Until a new final rule is promulgated, the transition provisions of Sec. 219.35 remain in effect. The 1982 rule is not in effect. During the transition period, responsible officials may use the provisions of the 1982 rule to prepare plan amendments and revisions. Projects implementing land management plans must comply with the transition provisions of Sec. 219.35, but not any other provisions of the 2000 planning rule. Projects implementing land management plans and plan amendments, as appropriate, must be developed considering the best available science in accordance with Sec. 219.35(a). Projects implementing land management plans must be consistent with the provisions of the governing plan.

36 C.F.R. § 261.50

(a) The Chief, each Regional Forester, each Experiment Station Director, the Administrator of the Lake Tahoe Basin Management Unit and each Forest Supervisor may issue orders which close or restrict the use of described areas within the area over which he has jurisdiction. An order may close an area to entry or may restrict the use of an area by applying any or all of the prohibitions authorized in this subpart or any portion thereof.

(b) The Chief, each Regional Forester, each Experiment Station Director, the Administrator of the Lake Tahoe Basin Management Unit and each Forest Supervisor may issue orders which close or restrict the use of any National Forest System road or trail within the area over which he has jurisdiction.

(c) Each order shall:

(1) For orders issued under paragraph (a) of this section, describe the area to which the order applies;

(2) For orders issued under paragraph (b) of this section, describe the road or trail to which the order applies;

(3) Specify the times during which the prohibitions apply if applied only during limited times;

(4) State each prohibition which is applied; and

(5) Be posted in accordance with Sec. 261.51.

(d) The prohibitions which are applied by an order are supplemental to the general prohibitions in Subpart A.

(e) An order may exempt any of the following persons from any of the prohibitions contained in the order:

(1) Persons with a permit specifically authorizing the otherwise prohibited act or omission.

(2) Owners or lessees of land in the area;

(3) Residents in the area;

(4) Any Federal, State, or local officer, or member of an organized rescue or fire fighting force in the performance of an official duty; and

(5) Persons engaged in a business, trade, or occupation in the area.

(6) Any other person meeting exemption requirements specified in the order.

(f) Any person wishing to use a National Forest System road or trail or a portion of the National Forest System, should contact the Forest Supervisor, Director, Administrator, or District Ranger to ascertain the special restrictions which may be applicable thereto.

Idaho Code § 36-102. Idaho fish and game commission.

(a) Creation. There is hereby created the Idaho fish and game commission. The department of fish and game of the state of Idaho is hereby placed under the supervision, management and control of said Idaho fish and game commission, hereinafter referred to as the commission or as said commission.

(b) Membership -- Appointment -- Qualifications. The commission shall consist of seven (7) members, to be appointed by the governor of the state of Idaho, who shall hold office during the pleasure of the governor and who shall be subject to removal by him. The selection and appointment of said members shall be made solely upon consideration of the welfare and best interests of fish and game in the state of Idaho, and no person shall be appointed a member of said commission unless he shall be well informed upon, and interested in, the subject of wildlife conservation and restoration. No member shall hold any other elective or appointive office, state, county or municipal, or any office in any political party organization. Not more than four (4) of the members of said commission shall at any time belong to the same political party. Each of the members of said commission shall be a citizen of the United States, and of the state of Idaho, and a bona fide resident of the region from which he is appointed as hereinafter set forth. Said members so appointed shall act and assume full powers and duties upon appointment, as herein provided, but such appointments shall be subject to confirmation by the senate at its next session.

* * *

Idaho Code § 36-104. General powers and duties of commission

* * *

(b) Authorization for Commission Powers and Duties. For the purpose of administering the policy as declared in section 36-103, Idaho Code, the commission is hereby authorized and empowered to:

1. Investigate and find facts regarding the status of the state's wildlife populations in order to give effect to the policy of the state hereinbefore announced.

2. Hold hearings for the purpose of hearing testimony, considering evidence and determining the facts as to when the supply of any of the wildlife in this state will be injuriously affected by the taking thereof, or for the purpose of determining when an open season may be declared for the taking of wildlife. Whenever said commission determines that the supply of any particular species of wildlife is being, or will be, during any particular period of time, injuriously affected by depletion by permitting the same to be taken, or if it should find a longer or different season, or different bag limit should be adopted for the better protection thereof, or if it finds that an open season may be declared without endangering the supply thereof, then it shall make a rule or proclamation embodying its findings in respect to when, under what circumstances, in which localities, by what means, what sex, and in what amounts and numbers the wildlife of this state may be taken.

* * *

Idaho Code § 36-408. Commission's authority

(1) Tags and Permits--Method of Use. The commission is hereby authorized to prescribe the number and kind of wildlife that may be taken under authority of the several types of tags and permits provided for in this title, and the manner in which said tags and permits shall be used and validated.

(2) Limit--Licenses, Tags or Permits--Controlled Hunts. The commission is hereby authorized to establish a limit annually as to the number of each kind and class of licenses, tags, or permits to be sold or issued and is further authorized to limit the number or prohibit entirely, the participation by nonresidents in controlled hunts.

* * *

Mont. Code Ann. § 87-1-201. Powers and duties.

* * *

(9) (a) The department shall implement programs that:

(i) manage wildlife, fish, game, and nongame animals in a manner that prevents the need for listing under 87-5-107 or under the federal Endangered Species Act, 16 U.S.C. 1531, et seq.;

(ii) manage listed species, sensitive species, or a species that is a potential candidate for listing under 87-5-107 or under the federal Endangered Species Act, 16 U.S.C. 1531, et seq., in a manner that assists in the maintenance or recovery of those species[.]

* * *

Mont. Code Ann. § 87-1-301. Powers of commission.

(1) The commission:

(a) shall set the policies for the protection, preservation, management, and propagation of the wildlife, fish, game, furbearers, waterfowl, nongame species, and endangered species of the state and for the fulfillment of all other responsibilities of the department as provided by law;

(b) shall establish the hunting, fishing, and trapping rules of the department[.]

* * *

Mont. Code Ann. § 87-3-130. Taking of wildlife to protect persons or livestock.

(1) This chapter may not be construed to impose, by implication or otherwise, criminal liability for the taking of wildlife protected by this title if the wildlife is attacking, killing, or threatening to kill a person or livestock, except that, for purposes of protecting livestock, a person may not kill or attempt to kill a grizzly bear unless the grizzly bear is in the act of attacking or killing livestock. In addition, a person may kill or attempt to kill a wolf or mountain lion that is in the act of attacking or killing a domestic dog. A person who, under this subsection, takes wildlife protected by this title shall, within 72 hours, notify the department and surrender or arrange to surrender the wildlife to the department.

* * *

Mont. Code Ann. § 87-5-301. Policy toward grizzly bear.

It is hereby declared the policy of the state of Montana to protect, conserve, and manage grizzly bear as a rare species of Montana wildlife.

Mont. Code Ann. § 87-5-302. Commission regulations on grizzly bear.

The commission shall have authority to provide open and closed seasons; means of taking; shooting hours; tagging requirements for carcasses, skulls, and hides; possession limits; and requirements for transportation, exportation, and importation of grizzly bear.

Wyo. Code Ann. § 23-1-101. Definitions of wildlife.

(a) As used in this act:

***

(xii) "Trophy game animal" means:

(A) Black bear, grizzly bear or mountain lion[.]

***

Wyo. Code Ann. § 23-1-302. Powers and duties.

(a) The commission is directed and empowered:

(i) To fix season and bag limits, open, shorten or close seasons including providing for season extensions for hunters with disabilities as established by commission rules and regulation, on any species or sex of wildlife for any type of legal weapon, except predatory animals, predacious birds, protected animals, and protected birds, in any specified locality of Wyoming, and to give notice thereof;

(ii) To establish zones and areas in which trophy game animals may be taken as game animals with a license or in the same manner as predatory animals without a license, giving proper regard to the livestock and game industries in those particular areas[.]

***

Wyo. Code Ann. § 23-1-401. Game and fish department; creation; control.

(a) The Wyoming game and fish department is created.

(b) The department is under the direction and supervision of the commission.

(c) The department consists of the director who is the chief administrative officer and such divisions as the commission may create.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case will be served by the appellate CM/ECF system.

I further certify that I have mailed the accompanying Supplemental Excerpts of Record by Priority Mail, postage prepaid, to the following:

s/ Douglas L. Honnold